

(22,378)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 162.

OMAHA ELECTRIC LIGHT AND POWER COMPANY,
APPELLANT,

vs.

THE CITY OF OMAHA AND WALDEMAR MICHAELSON.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1909, of said Court, before the Honorable Walter H. Sanborn and the Honorable Elmer B. Adams, Circuit Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the thirty-first day of August, A. D. 1909, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the District of Nebraska was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Omaha Electric Light and Power Company was Appellant and the City of Omaha and Waldemar Michaelson were Appellees, which said transcript of record is in the words and figures following, to wit:

1 *Pleas Before the Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, Sitting in the Circuit Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the April 1909 Term of the Omaha Division of said Court.*

Be it remembered, that on the 29th day of June, 1908. Bill of Complaint was filed in the office of the Clerk of the Circuit Court which said Bill of Complaint is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

In Equity.

OMAHA ELECTRIC LIGHT AND POWER COMPANY
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. "Y," Page 105.

The Bill of Complaint of Omaha Electric Light and Power Company.

To the Judges of said Court:

The Omaha Electric Light and Power Company brings this suit in equity against The City of Omaha and Waldemar Michaelson and for its cause of action says:

(1) The plaintiff, Omaha Electric Light and Power Company, is a corporation created by and organized under the laws of the State of Maine, and is a citizen of said State of Maine.

(2) The defendant, The City of Omaha, is a municipal corporation created by and organized under the general laws of the State of Nebraska, and is a citizen of said State of Nebraska, and the defendant Waldemar Michaelson is an officer of said municipal corporation, whose official title is City Electrician, and he is a resident and citizen of said State of Nebraska.

(3) This suit is a controversy between citizens of different states and the matter in dispute in said controversy exceeds, exclusive of interest and costs, the sum or value of Two Thousand (2000) Dollars.

2 During the year 1884 the defendant, The City of Omaha, having full power therefor by and under the general laws of the State of Nebraska, did, by ordinance, grant to New Omaha-Thompson-Houston Electric Light Company and its assigns, the privilege, license, and franchise for the erection and maintenance of poles and wires, with all needful appurtenances thereto, upon and over the streets, alleys and public grounds of the said City, under such regulations as should be thereafter provided by ordinance of said City, which said granting ordinance is in words and figures as follows, to-wit:

“Ordinance No. 826.

An ordinance granting the right of way to the New Omaha-Thompson-Houston Electric Light Company and regulating the same, and prescribing penalties for the violation of this ordinance.

Be it ordained by the City Council of the City of Omaha:

SECTION 1. That the New Omaha-Thompson-Houston Electric Light Company, or assigns, is hereby granted the right of way for erection and maintenance of poles and wires, with all the appurtenances thereto, for the purpose of transacting general electric light business through, upon and over the streets, alleys and public grounds of the City of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance. Provided, that said Company shall at all times, when so requested by the city authorities, permit their poles and fixtures to be used for the purpose of placing and maintaining thereon any wires that may be necessary for the use of the fire department or police of the city; and, Provided Further, such poles and wires shall be erected so as not to interfere with the ordinary travel through such streets and alleys; and Provided, that whenever it shall be necessary for any person to move along or across any of said streets or alleys any vehicle or structure of such height or size as to interfere with any of the wires so erected the company operating such poles and wires shall, upon receiving twelve (12) hours notice thereof temporarily remove said poles and wires from such place as must necessarily be crossed by such vehicle or structure; and Provided Further, that whenever the City Council shall, by ordinance, declare the necessity of removing from the pub-

lic streets and alleys of the City of Omaha the telegraph, telephone or electric poles or wires thereon constructed or existing, said company shall, within sixty (60) days from the passage of such ordinance remove all poles and wires from such streets and alleys by it constructed, used or operated.

3 SECTION 2. Any person who shall interfere, cut, injure, remove, break or destroy any of the poles, wires, fixtures, instruments or other property of the New Omaha-Thompson-Houston Electric Light Company, or assigns, within the corporate limits of this city, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not exceeding One Hundred Dollars.

SECTION 3. This ordinance shall take effect and be in force from and after its passage."

(5) New Omaha-Thompson-Houston Electric Light Company was a corporation organized under the laws of the State of Nebraska, for the purpose, among other things, of constructing and maintaining lines of wire conductors suspended upon poles and cross arms for the transmission of electric current from central or generating stations to points of consumption, and for the production of light for the illumination of public streets and private buildings. Said New Omaha-Thompson-Houston Electric Light Company accepted the grant from the defendant city and the terms thereof and thereafter, beginning in the year 1885, expended a large sum of money, to-wit: more than the sum of \$1,500,000.00 *Dollars* in the erection of a plant and acquisition of machinery for the generation of electric current and a system of pole lines and wire conductors and all necessary superstructures in the streets and alleys of said city for the transmission of such electric currents throughout the city for the lighting of public streets and sale and distribution of the same to consumers, and which said system has, during all of the time since, been maintained, used and operated through and in the streets of said city by means of such poles and superstructures, or by means of sub-ways constructed under the surface of such streets and alleys; that the said New Omaha-Thompson-Houston Electric Light Company and this plaintiff, as its successor, has been, during all of said period, actually engaged in furnishing to private or individual consumers electric current by means of the said plant, and have, during all of said period, been the only person or corporation engaged generally in said business, or having any authority to occupy the streets and alleys of said city therefor.

(6) In the year 1902 the defendant, The City of Omaha, passed an ordinance entitled "An Ordinance requiring all electric and other wires, when used for electric lighting, heat, power and other commercial purposes, excepting those used for propelling street cars and telegraph and telephone wires, to be placed under ground in a part of the City of Omaha," whereby it was ordained, among other things, that all persons or companies owning, maintaining or operating electric or other wires in said city, for the transmission of electricity for light, heat and power should, on or before the

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first day of October, 1905, place all such wires, in a district defined by said ordinance, underground, and that after said date no person or company should be permitted to maintain any such wires within the district defined, without first complying with said ordinance, excepting such feeder and trolley wires as were used for propelling street cars and telephone and telegraph wires, and providing a penalty for maintaining any wires overhead in said district in violation of said ordinance; that said ordinance was designed as a police regulation compelling New Omaha-Thompson-Houston Electric Light Company to construct subways and place its wires underground in the district defined by the ordinance and in the extensions of said district. A copy of said subway ordinance is hereto attached and made part hereof and marked Exhibit "A."

(7) Afterwards the life of New Omaha-Thompson-Houston Electric Light Company was about to expire by limitation of time and this plaintiff was organized to become its successor and to take over its property, rights and privileges, and thereupon, to-wit: July 29, 1903, said New Omaha-Thompson-Houston Electric Light Company sold, assigned, and transferred to this plaintiff all of its property, rights and franchises (excepting its corporate franchise), including the right, license and franchise to occupy the streets and alleys of said city granted to said New Omaha-Thompson-Houston Electric Light Company by the ordinance of 1884, as hereinbefore alleged, and the said New Omaha-Thompson-Houston Electric Light Company, prior to said assignment, and this plaintiff, afterwards, fully complied with the requirements of said police regulation and expended a large sum of money, aggregating, to-wit: more than the sum of 400,000 dollars in the construction of subways and in placing such wire conductors in cables underground, within the district defined by said ordinance.

(8) Plaintiff further avers that in the year 1884 and for sometime thereafter the use of electric currents for producing power and heat had not been extensively developed, that electric currents adequate for the production of street and inside lighting are required to be of high potentiality and at the time of granting the franchise by the defendant city, as aforesaid, it was, and all of the time since it has been, the universal custom of all companies engaged in generating and distributing such electric currents for use in the production of street and inside lighting to supply consumers with such quantity

of current as was or may be demanded for such use as such consumers may see fit to make of the same; that the universal method of companies engaged in generating and distributing electric current for the production of light was at the time of granting said franchise, and ever since has been, except in public street lighting, to sell and transmit the current by means of wire conductors to the premises of the consumer, to be used by him, not for any specific or restricted purpose, but for all purposes for which he desired or may desire to use the same; that the specific use of such currents has never been either dictated by or under the control of such companies; that such currents have always been converted into light by the consumer himself, upon his own premises, by means of a

switch or key, the manipulation of which permits the current to flow through a lamp which, by interposing resistance, produces light and which apparatus is under control of the consumer; that the business, so far as it is controlled and conducted by the company generating and distributing the necessary and adequate electric currents, consists in merely supplying such current to the consumer and upon the consumer's premises, ready for conversion to his use; that the conversion of such current into, or the use of the same for the production of power or heat, is and has always been done by the consumer himself, upon his own premises, by means of a switch or key manipulated and operated, upon the same principle as in the production of light, by the consumer himself, and which permits the current to flow through a motor or heating device which is also under the control of, and operated and owned by the consumer; that in the conversion of such currents into power and heat the apparatus by which the consumer converts the current into light is often removed temporarily, and the appropriate apparatus for producing power or heat, according to the requirements of the consumer is connected by him with the identical supply conductor from which he takes the current for conversion into light, without any action whatever on the part of the company who supplies the current, the use of the respective apparatuses being interchangeable as the convenience of the consumer may require; that when the business of the consumer requires the use of current for light and power, or heat, at the same time, the different apparatuses are connected by different conductors, so that identically the same current delivered to the premises of the consumer by means of the same conductor is divided and distributed by the consumer upon his own premises and converted to such use as he desires; that in a great majority of cases the current which is converted into power or heat is taken from the same conductor which simultaneously supplies current for conversion into light,

6 such current being merely divided by means of connecting conductors which distribute the same; that for the supply of consumers who require a large number of power units the plaintiff maintains in said city five exclusive conductors suspended upon the same pole lines or drawn into the same conduits with its other circuits; but in such cases the conversion of the current into power is done by the consumer upon his own premises, by the means aforesaid; that no different use whatever is, or has ever been, made of the streets and alleys of the city, whether the current be employed by the consumer for the production of light, power or heat, and the sale of electric current, by plaintiff, which consumers convert into power or heat, is merely the disposition of surplus product of plaintiff's generating system, exceeding that required by the public for producing light, but which is of great public utility and convenience when applied to manufacturing, business and domestic uses; that the New Omaha-Thompson-Houston Electric Light Company did, during all of the time prior to the transfer to the plaintiff as aforesaid, transmit, and this plaintiff has, during all of the time since, transmitted, electric current in the manner herein alleged to numerous and a continuously increasing number of consumers who converted such electric

current into power or heat as such consumers desired and in the manner and by the devices herein alleged and all with the knowledge and acquiescence of the defendant city.

9. The defendant city has continuously, since 1884, by ordinances passed at various times and intended to apply to the plaintiff and its predecessors, New Omaha-Thompson-Houston Electric Light Company, and to consumers supplied with electric current by each, regulated the installation of conductors and appliances for the transmission and use of such currents for power and heat, all of which said regulations have been complied with by New Omaha-Thompson-Houston Electric Light Company and by this plaintiff. That is to say, that said defendant city has passed ordinances prohibiting all persons from using electric currents for power or heat or from installing new or repairing old apparatus therefor, without first filing plans and specifications for the same in the office of the City Electrician and obtaining a permit for such installation and use, describing the plan of construction, material, apparatus and proposed use; and ordinances empowering and requiring the City Electrician to make inspection of such installations and repairs before and after the same were made and requiring the same to conform to the regulations of the city and the requirements of such City Electrician in the interest of safety; and ordinances requiring said

7 City Electrician to re-inspect all such installations and apparatus at least once each year and to require the persons owning or using the same to conform to the regulations and the requirements of said City Electrician in the interest of safety; requiring the payment of fees for permits, for motors, to-wit: "one-horse power or less, \$1.00, excess at 50 cents; ten-horse power, \$5.50, excess at 25 cents; no charge for any motor installation to exceed \$10.00." and ordinances requiring the payment of fees for inspection and for permits granted for installation of conductors and apparatus for the conversion of electricity into heat and power; and ordinances requiring all persons and corporations engaged in commercial lighting and power transmission to furnish the City Electrician, on the first day of each month, a report showing each motor installation connected to their system during the month and each such motor installation discontinued during the month; and ordinances requiring all persons doing wiring for motors and for light, heat and power to obtain a permit and pay a license fee of \$5.00 therefor, upon examination and proof of qualification; and ordinances requiring all drop wires designed to carry power current to be heavily insulated; and ordinances prohibiting electric light and power wires being attached to the same cross arm and not to be suspended upon the same pole line with conductors of low potential currents like telephone and telegraph wires, and requiring all wires designed to carry an electric light or power current to be covered with substantial high-grade insulation and all connections with electric light or power conductors to be made at right angles, and pursuant to said regulations the defendants have made inspection of hundreds of installations for the use of electric current for power and heat by consumers to whom New Omaha-Thompson-Houston Electric Light Company and this plaintiff sup-

plies the current pursuant to the franchise aforesaid and the said defendant city has issued hundreds of permits for such installations and has received the established fees therefor from such consumers and from electricians employed by them and from this plaintiff and its said predecessor, all with full knowledge of the facts herein alleged and with full knowledge that New Omaha-Thompson-Houston Electric Light Company and this defendant were relying upon the grant of said franchise and intending thereunder to furnish the electric current to such consumers.

10. Prior to the transfer of its property and franchise to plaintiff as hereinbefore alleged the New Omaha-Thompson-Houston Electric

8 Light Company supplied the City of Omaha with street lights by contract and by said contract agreed to pay to the defendant city annually, a sum equal to three (3) per cent of its gross receipts from lighting and power business done within the city of Omaha, excepting such gross receipts as were derived from the said city for such street lighting, and at the expiration of said contract this plaintiff entered into a similar contract with said city, which said contract is still in force and a copy of the same is hereto attached and made part hereof and marked Exhibit "B," whereby plaintiff agreed to pay to said city a sum equal to three (3) per cent of its gross receipts from lighting and power business done within the city and pursuant to said contract said New Omaha-Thompson-Houston Company and this plaintiff have paid to the defendant city in the aggregate the sum of 12,619.00 dollars for gross receipts from the sale of electric current to consumers for the production of power alone, and plaintiff says that, continuously since the granting of said franchise, the defendant city and said New Omaha-Thompson-Houston Electric Light Company and this plaintiff have, by practical and almost daily actual application of the same, construed the said franchise, license or privilege, granted as aforesaid, as a right to occupy the streets and alleys with the proper appliances for the transmission of electric current for sale to consumers without any restriction whatever upon the plaintiff as to the use to be made of such current by such consumers, the said defendant city having full power to restrict the consumers to lawful uses and safe methods of use; that since the granting of said franchise the use of electricity for the production of power and heat has been greatly developed by invention of new and improved devices, so that the same has come to be very extensively employed by the public for domestic, business and manufacturing purposes; that many important businesses have been equipped at great expense, by the owners, for the use of electric current in the production of power and have become dependent upon such service, such as the grain business operating grain elevators, and all kinds of business requiring freight or passenger elevators in buildings, manufacturing business requiring power for the operation of machinery, and a large part of the current generated and distributed to consumers by plaintiff is employed by said consumers for the production of power and heat; that this plaintiff has, relying upon the interpretation continuously given to said franchise as hereinbefore alleged, expended large sums of money,

in the acquisition of said plant and franchise from New Omaha-Thompson-Houston Electric Light Company and in the extension and equipment of the same with the newest, most modern and most economical devices and machinery for generating the electric current for supplying the demand of the public, so that plaintiff has now an investment within the City of Omaha of more than 2,500,000 Dollars and its gross annual income from the sale of electric current in Omaha, which is employed by consumers in the production of power, exceeds, 116,000 Dollars, and is equal to about one-fourth of its gross income from business within the City of Omaha.

11. The capacity of plaintiff's generating plant and machinery has been developed, improved and enlarged from time to time to meet the increasing necessities and demand of the public for electric current, due to the increased use of electricity caused by new discoveries and inventions, and to the general growth and development of the City of Omaha, and to enable plaintiff to produce such current at the lowest cost to the consumers. To a very large extent the current consumed for producing power and heat is demanded during the day time when the consumption for light is least and the current consumed for producing light is, to a great extent, demanded during the night time when the demand for power and heat is least, and by keeping its plant and system in continuous operation and as nearly as possible to its full producing capacity, plaintiff is able to serve the public at lowest cost and to its own advantage, and plaintiff's whole system has been developed and built up in reliance upon the interpretation of its franchise right as hereinbefore set forth.

12. Until about the 26th day of May, 1908, the defendant city, had not questioned the right of plaintiff under the granting ordinance aforesaid to generate and transmit electric current to consumers through, upon, over, and under any of the streets and alleys of said city by means of its pole lines and wire conductors and its conduits and wire conductors, therein, or that such consumers had no right to employ electric current so generated and transmitted by plaintiff for the production of power or heat, or that the plaintiff had no right to generate and transmit such electric current to any such consumer who would or who intended to use the same for the production of power or heat. But now the defendant city claims and gives out that this plaintiff has no right, under the said franchise, to transmit or deliver to any consumer any electric current which the said consumer may intend to use by converting the same into power or heat and on said 26th day of May, 1908, the defendant city, by its Mayor and Council, passed the following concurrent resolution and caused a copy thereof in writing to be served upon plaintiff, to-wit:—

10

"Concurrent Resolution No. 2330.

Resolved, by the City Council of the City of Omaha, the Mayor concurring, that the City Electrician be and he is hereby ordered and directed to disconnect, or cause to be disconnected, on or before July 1st, 1908, all wires leading from the conduits or poles of the

Omaha Electric Light and Power Company transmitting electricity to private persons or premises to be used for heat or power; and to take such steps as may be necessary to prevent the said Omaha Electric Light and Power Company from furnishing or transmitting from the conduits or wires electricity to private persons or premises for heat or power purposes; and be it further resolved, by the City Council of the City of Omaha, the Mayor concurring, that the Electrician be and is hereby ordered and directed to remove or cause to be removed on or before July 1st, 1908, all conduits, wires and poles belonging to the Omaha and Council Bluffs Street Railway Company and located in, under, upon or over, any street, alley, thoroughfare, or public place of the City of Omaha and maintained and used by said Street Railway Company for furnishing or transmitting electricity to private parties or premises for light, heat or power purposes.

Introduced by Councilman M. F. Funkhauser.

Passed May 26th, 1908.

Attest:

DAN B. BUTLER,
City Clerk.

Approved:

JAMES C. DAHLMAN, *Mayor.*

L. B. JOHNSON,
Pres. of Council.

And on the 16th day of June, 1908, the defendant Waldemar Michaelson, City Electrician of said City, served notice in writing on plaintiff, in words and figures as follows, to-wit:—

"City of Omaha, Electrical Department.

Waldemar Michaelson, City Electrician.

OMAHA, NEBR., *June 16, 1908.*

Omaha Electric Light & Power Company, Omaha, Nebr.

GENTLEMEN: In accordance with Concurrent Resolution #2330, passed by the Council May 26-08, and approved by His Honor the Mayor, June 1-08, you are hereby notified that unless you disconnect or cause to be disconnected before July 1-08, all wires
11 leading from conduit or poles of your Company transmitting electricity to private persons or premises to be used for heat or power, it will, on the date above mentioned, become my duty to cause the disconnection of said wires.

Respectfully yours,

WALDEMAR MICHAELSON,
City Electrician."

And the said Michaelson, has since notified plaintiff, orally, that he will, on the first day of July, 1908, unless plaintiff then ceases to transmit electric current to consumers who employ the same for

the production of power or heat, or for any other purpose than the production of light, he will, with the assistance and authority of the police force of said city, execute the concurrent resolution aforesaid, and will, by force, sever the connection of plaintiff's wire conductors so as to prevent the transmission of electric current to such consumers, and continuously, by force, prohibit and prevent the restoration of the same. Plaintiff says as it is the fixed purpose of the said Waldemar Michaelson to carry out the instructions embodied in the joint resolution of the Mayor and Council aforesaid, and it is the intention and purpose of the defendant city to have the same carried out and enforced and for that purpose the defendant city will afford the said defendant Michaelson the protection and assistance of the police force of said city and unless restrained by the process of this court the said defendant Michaelson will execute the said resolution and that such forcible interference with plaintiff's said business will stop the transmission of electric current to plaintiff's patrons within the City of Omaha and to a large number of patrons outside of said City, in South Omaha, Council Bluffs and elsewhere and will prevent the said patrons from carrying on their usual and lawful business and produce enormous losses to them and to the public; that such interference will produce great and irreparable loss and damage to this plaintiff, the amount of which loss and damage, in money, it will be impossible to ascertain and determine so that the plaintiff may be adequately compensated therefor; and that plaintiff has no adequate remedy at law for the wrongs and lawless acts threatened and now about to be committed by the authority and in the name of the defendant city and under color of official power.

Wherefore, as plaintiff can have no adequate relief, except in this court, and to the end, therefore, that the defendants The City of Omaha and Waldemar Michaelson, may, if they can, show why plaintiff is not entitled to receive the relief herein prayed for, and

12 that the said defendants may make full, true, perfect and direct answer hereto and thereby truthfully disclose and make discovery of all the matters hereinbefore alleged, all according to the best and utmost of their knowledge, information and belief (but not under oath, an answer under oath being hereby expressly waived), and that the said defendants, The City of Omaha, its officers and representatives, and the defendant Waldemar Michaelson, and his successors in office may be, by the process and decree of this court perpetually enjoined and restrained from cutting, removing or otherwise severing or disconnecting the wire conductors, or any wire conductor, or in any manner whatever interfering with such conductors or any other structure, apparatus or device belonging to plaintiff so as to stop or impede the plaintiff in its business of transmitting electric current to and for the use of any person or persons who have contracted, or who may hereafter contract, for such service to be rendered and performed by plaintiff, and the plaintiff may be thereby completely protected, against the threatened interference with its property and rights, plaintiff prays that Your Honors may grant a writ or injunction to be issued out

of and under the seal of this court enjoining and restraining the said defendants, pendente lite as aforesaid, and that, by final decree, the said injunction be made perpetual.

And plaintiff further prays that upon rendering final decree Your Honors will, in addition to the taxable costs herein, assess adequate damages against defendants and in favor of plaintiff, including not only all reasonable expense incurred by plaintiff in the prosecution of this suit, most unjustly caused by the defendants, but any and all other damages which plaintiff may then have sustained.

And plaintiff further prays that a restraining order be issued by the court restraining the said defendants as aforesaid, pending the hearing of the application to the court for an injunction pendente lite and for such other and further relief as Your Honors may find to be due to plaintiff, and

May it please your Honors to grant plaintiff, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said defendants, The City of Omaha and Waldemar Michaelson, commanding them and each of them, on a day certain, to appear and answer this Bill of Complaint and to abide and perform such order
13 and decree as to the court shall seem proper and be required by the principles of equity and good conscience.

WESTEL W. MORSMAN,
Solicitor and Counsel for Plaintiff.

UNITED STATES OF AMERICA,
State of Nebraska, County of Douglas, ss:

I, Frederick A. Nash, on my oath do say that I am president of Omaha Electric Light and Power Company, the plaintiff named in the foregoing Bill of Complaint; that I am familiar with the plaintiff's business and with the facts alleged and set forth in the foregoing Bill of Complaint, which I have read, and the facts therein set forth are true, so help me God.

FREDERICK A. NASH.

Subscribed and sworn to by Frederick A. Nash, before me, the 29th day of June, A. D. 1908.

[SEAL.]

MABEL C. HIGGINS,
Notary Public.

EXHIBIT "A."

Ordinance No. 5051.

An ordinance requiring all electric and other wires, when used for electric light, heat, power and other commercial purposes, excepting those used for propelling street cars, and telegraph and telephone wires to be placed underground in a portion of the City of Omaha.

Be it ordained by the City Council of the City of Omaha:

SECTION 1. That all persons and companies owning, maintaining or operating electric wires or other wires in the City of Omaha, and

in the district hereinafter defined, for the transmission of electricity for light, heat and power, shall on or before the first day of October, 1905, place underground all such wires, and after said date, no persons or companies shall be permitted to maintain in said district in any streets, alleys, or public grounds of said City any electric or other wires, without first complying with the provisions of this ordinance, excepting however such feeder and trolley wires as may be used for propelling street cars and telegraph and telephone wires.

SECTION 2. The district mentioned in section one (1) of this ordinance, shall be that portion of the City bounded on the east by Eighth Street, on the west by Eighteenth street, on the south by

Howard street, and on the north by Capitol Avenue, but
14 nothing herein contained shall be construed to prevent the enlargement of such district from time to time as the growth of the City may require.

SECTION 3. For the purpose of complying with the requirements of this ordinance all persons or companies shall, on or before the expiration of the time aforesaid, construct in the streets and alleys of the City within said district, underground conduits with all necessary appliances and devices to make the work modern, safe and efficient; all such construction shall be located in alleys, when possible, in preference to streets, and shall be located under the supervision of the City Electrician.

SECTION 4. Distributing poles for wires may be placed in the alleys between streets, providing no such pole or poles are placed within fifty feet of the curb line of said streets and in no case will overhead wires from such poles be allowed to cross the streets; For street arc lights and lighting street intersections laterals may be run from the main subway.

SECTION 5. Before construction of any of the work hereby required, the said persons or companies shall file with board of public works a plan and map and all necessary details of the work with specification showing the material to be used and the method of construction to be employed all of which shall be subject to the inspection of the City Electrician; and no such construction shall be commenced until the plans and specifications shall have been approved by the Board of Public Works and all such construction shall be carried on under the direction of the Board of Public Works.

SECTION 6. All persons or companies constructing such subways shall as fast as the construction of such subway or conduit progresses, promptly fill all openings in the streets and alleys and relay all curbing, paving and guttering, which may necessarily be removed in the construction of the work, and shall pay all damages for personal and other injuries that may occur, either to private individuals or corporations as well as to the City of Omaha, resulting from or growing out of the negligence or (or) want of care of said persons or companies in the construction of any of the work herein required.

SECTION 7. The location of the underground work herein provided for shall not interfere with sewers constructed or in progress of construction or with gas or water pipes already laid or with the underground work of any telephone company, and must be located

and constructed without unnecessary injury or inconvenience to the public.

15 SECTION 8. All the provisions of this ordinance shall be applicable to any other district hereafter created or to any part of the City which by extension of the district herein defined shall be included therein.

SECTION 9. Any person or companies who shall maintain any electric wires, or other wires, in the streets or alleys of the City of Omaha in violation of this ordinance shall on conviction be punished by a fine not exceeding \$100.00 and all such electric wires or other wires may be removed by the City Electrician after thirty days' notice in writing.

SECTION 10. This ordinance shall take effect and be in force from and after its passage.

EXHIBIT "B."

City Contract (Omaha).

This agreement made and entered into this 12th day of April, A. D. 1905, by and between the Omaha Electric Light and Power Company, hereinafter called the Company, and the City of Omaha, hereinafter called the City,

"Witnesseth, That for and in consideration of the covenants and agreements hereinafter contained, and under penalty of a bond for \$10,000 to be given by the Company on demand, the Company does hereby agree with the City to light the streets, alleys and public grounds and buildings of the City of Omaha, in accordance with the following terms and conditions, to-wit:

There being an agreement now in force by and between the parties hereto, covering the lighting of the streets, alleys and public grounds of the City of Omaha for a term of years, which term will expire on the 31st day of December, A. D. 1905, which term both parties desire to extend, it is now agreed by and between the parties hereto, that the said term of lighting shall be extended, under and by virtue of this agreement, for a period of four years from the 31st day of December, A. D. 1905, and until the 31st day of December, A. D. 1909, during which term all electric lamps and lights required by the City for lighting the streets, alleys, public grounds and public buildings in the City of Omaha shall be furnished by the Company.

In Consideration of the extension of the term of said contract, the Company hereby agrees to reduce the price of all arc lamps herein provided for, to the sum of Seventy-five (75.00) Dollars per light per year, commencing on the date this contract shall take effect and be in force.

16 It is mutually agreed that the Company shall at all times furnish, and the City shall use and pay for, not less than Six Hundred arc lights, in accordance with the terms of this agreement.

For operating at normal candle power, each arc light shall be supplied constantly, when in use, with six and six tenths (6.6) amperes of current at a difference of potential of not less than seventy

(70) volts measured at the terminals of the lamp, or the equivalent in watts; either direct or alternating current lights may be used at the option of the Company.

To enable tests of the amount of electrical energy being furnished to be made by the City Electrician, the Company hereby agrees to run one of its municipal circuits into the office of the City Electrician [in one of its municipal circuits into the office of the City Electrician] in the city building, and to maintain the same during the period covered by this contract, and allow the City Electrician, at such times as he may desire, to test the same as to the amount of electrical energy supplied. The Company further agrees to permit the City Electrician, or the proper officers representing the City, to enter its power house at any reasonable hour, for the purpose of measuring the amount of electrical energy that is being furnished on all streets or lighting circuits, or for the purpose of making other tests that are reasonably necessary under the operation of this contract. All arc lights shall be lighted by the Company every night during the said term at twilight, and kept continually lighted until daylight, and they shall be kept in order by, and at the expense of, the Company.

All arc lights shall be located at the places designated by the Mayor and Council, except that it is mutually agreed that no arc lights shall be placed at such a place (without the consent of the Company) that in order to reach said place, an extension of the circuits of the Company of more than One Thousand (1000) feet shall be required.

After an arc light has been located and erected in place, it shall be moved upon request of the City, but the cost of such removal to another location shall be borne by the City.

The Company further agrees that in placing the said arc lights in position, in digging and excavating, in streets, in erecting poles and wires, in making repairs, and in laying underground conduits or in doing any other act required by any ordinance of the City, and in the use or maintaining of its structures, and plant, it will

carefully observe and indemnify and save the City harmless
17 against all suits and actions brought against it for any injuries or damages sustained by any person or persons, by reason of the maintaining of said electric lines, wires or poles, or other structures or parts of the Company's plant, which shall be due to the negligence of the Company or by reason of the failure of the Company to do or perform any of the said acts or things.

Therefore, in consideration of the faithful compliance with the terms and conditions herein contained, the City of Omaha hereby agrees to pay to the Company at the rate of Seventy-five Dollars (\$75.00) per annum, for each of said arc lights so furnished and used, and for every failure or neglect to light any of said arc lights, or when said arc lights are lighted they shall consume less electrical energy than the quantity hereinbefore mentioned, the Company shall rebate to the City the proportion of the rates above mentioned, for the consumption of electrical energy, which amount may be deducted from the sum owing to said Company under this contract.

The Company agrees to furnish electric lights for the City Hall, and any other public buildings belonging to the City, and the City hereby agrees to pay for all incandescent lights that may be used by the City at the rate of eight (8) cents per one thousand (1,000) watts of all current consumed.

All sums due and payable to the Company by virtue of this agreement shall be paid monthly by the City to the Company at the expiration of each month.

And in further consideration of the terms hereby agreed upon, the Company hereby agrees to pay, during the term, to the City a sum equal to three (3) per cent of its gross receipts from lighting and power business done within the City, not including any revenue derived from the said City, said payments to be made annually, on or before the 10th day of January in each year during the term, and any renewal or extension that may hereafter be made of the same.

It is mutually agreed by the parties that, if, at any time after December 31st, A. D. 1908, the City shall acquire a plant of its own, for street lighting, by electricity, then and in that event the City may, at its option, at once determine this contract, and on notice therefor all further rights and obligations thereunder shall at once cease and determine.

18 In Witness Whereof, the said parties have caused these presents to be duly executed and attested, and their respective seals to be attached the date first above written.

(Signed)

OMAHA ELECTRIC LIGHT AND
POWER CO.,

[SEAL.]

By F. A. NASH, *President*.

Attest:

S. E. SCHWEITZER, *Secretary*.

[SEAL.]

THE CITY OF OMAHA,

By H. B. ZIMMAN, *Acting Mayor*.

Attest:

W. H. ELBOURN,
City Clerk.

Endorsed: Filed June 29, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: At the April, 1908 Term of said Court, and on the 29th day of June, 1908, the following Restraining Order was signed and filed in said case, and duly entered of record in Journal No. "7" of said Court, to-wit:

In Equity.

OMAHA ELECTRIC LIGHT & POWER COMPANY
VS.

THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. "Y," Page 105.

Restraining Order.

On this 29th day of June, 1908, on motion of W. W. Morsman, counsel for plaintiff in the above entitled cause, and upon reading the Bill of Complaint, it is

Ordered, that the application for an injunction pendente lite therein prayed for be heard before ——— one of the Judges of the District Court, at Omaha, Neb., on the 5th day of September, 1908, at 9:30 o'clock A. M., of said day, and it appearing from the Bill of Complaint that the plaintiff will suffer irreparable loss and injury if the defendants are not restrained from committing the acts which the Bill of Complaint charges they intend to commit before such hearing, it is further

Ordered that upon the filing of the Bill of Complaint in the office of the Clerk of this court and a bond in the penal sum of 500 Dollars, to be approved by the Clerk and conditioned to pay and indemnify the said defendants against all damages they or either of them may sustain, by reason of being restrained from committing such acts, that the said defendants, The City of Omaha and

19 Waldemar Michaelson, be and they are each hereby restrained and commanded to desist and refrain, until further order in said cause, from cutting, removing or otherwise severing or disconnecting the wire conductors, or any wire conductor, or in any manner whatever interfering with such wire conductors or any other structure, apparatus or device belonging to plaintiff, so as to stop or impede the plaintiff in its business of transmitting electric current to, and for the use of, any person or persons who have contracted, or who may hereafter contract, for such service to be rendered and performed by plaintiff, and that the said defendants, and each of them, appear at the time and place aforesaid and show cause why an injunction pendente lite shall not issue as prayed for by the plaintiff.

Done at Chambers, at Omaha, in the District aforesaid, on the 29th day of June, A. D. 1908.

THOMAS C. MUNGER, *Judge.*

Endorsed: Filed June 29, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 17th day of August, 1908, Answer was filed in said case, which said Answer is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

In Equity.

OMAHA ELECTRIC LIGHT AND POWER COMPANY
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. "Y," Page 105.

Answer of the City of Omaha and Waldemar Michaelson to the Bill of Complaint.

I.

These defendants, saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering *said*:

II.

Defendants referring to paragraph one of the bill admit that the Omaha Electric Light and Power Company is a corporation and is a citizen of the State of Maine; and defendants allege that 20 said plaintiff has not filed a copy of its articles of incorporation in the office of the Secretary of State of the State of Nebraska, and therefore not entitled to do business in the State of Nebraska, or to acquire franchises or other rights or privileges in the streets of the City of Omaha; and defendants admit that the City of Omaha is a municipal corporation existing under the laws of the State of Nebraska, and a citizen thereof, and that Waldemar Michaelson is City Electrician of said city and a resident of said city; that this suit is a controversy between citizens of different states and that the matter in dispute in said controversy exceeds exclusive of interest and costs, the sum of \$2,000.00.

III.

These defendants further answering said bill and referring to paragraph three thereof deny that the city of Omaha during the year 1884 or at any other time did by ordinance grant to the New Omaha-Thompson-Houston Electric Light Company, and its assigns, the privilege, license and franchise for the erection and maintenance of poles and wires with all needful appurtenances thereto, upon and over the streets, alleys and public grounds of said city; and defendants deny that in December, 1884, the Mayor and City Council of the City of Omaha passed the ordinance which is set out in complainant's bill as Ordinance No. 826, and deny that the purported copy of Ordinance No. 826 of the City of Omaha as set forth

in complainant's bill is a correct copy of said ordinance. With reference thereto defendants admit that the City Council in 1884 passed General Ordinance No. 826 purporting to grant certain rights and privileges in and over the streets of the City of Omaha to the Omaha New Thomson & Houston Electric Light Company or its assigns; and defendants further allege that at the time said Ordinance No. 826 was passed there was no person, association, partnership or corporation existing by the name of Omaha New Thomson & Houston Electric Light Company, and there was no person, association, partnership or corporation capable of accepting, taking, or holding any of the rights, privileges, permits or licenses attempted to be granted under said Ordinance, No. 826, and that said Ordinance No. 826, by reason of the premises was null and void, and conveyed no rights or privileges or licenses to any person, firm or corporation. That said ordinance was intended as a special ordinance, conferring the rights, privileges and licenses therein contained upon a certain corporation, to-wit: Omaha New Thomson & Houston Electric Light Company, and upon no other person, firm or corporation; and defendants further allege that neither

21 at that time nor at any time since has there existed any person, firm, partnership or corporation named or known as the Omaha New Thomson & Houston Electric Light Company, and therefore none of the rights, licenses or privileges sought to be conferred and granted by ordinance No. 826, have been received, accepted by or vested in any person, firm, partnership or corporation.

IV.

That after the approval of said Ordinance No. 826, to-wit: on or about the 28th day of September, 1885, there was incorporated for the first time under the laws of the State of Nebraska, a corporation under the name of New Omaha Thompson-Houston Electric Light Company, which corporation was not in existence when Ordinance No. 826 was passed and approved. That in the year 1899 the City Council of the City of Omaha passed ordinance No. 4569, in words and figures as follows:

Ordinance No. 4569.

An ordinance amending an ordinance numbered 826, entitled: "An ordinance granting the right of way to the Omaha New Thomson-Houston Electric Light Company and regulating the same and prescribing penalties for the violation of this ordinance."

Whereas, Ordinance No. 826, entitled: "An Ordinance granting the right of way to the Omaha New Thomson & Houston Electric Light Company and regulating the same and prescribing penalties for the violation of this ordinance", passed December 16th, A. D. 1884, granting certain privileges and franchises therein defined and regulating the exercise of the same and prescribing penalties for the violation of said ordinance by mistake named the "Omaha New Thomson & Houston Electric Light Company", as grantee, and

Whereas, the intention was to name the "New Omaha Thomson-

Houston Electric Light Company" as such grantee, which is the true name of the corporation to which said privileges and franchises were granted.

Be it ordained by the City Council of the City of Omaha:

SECTION 1. That Ordinance No. 826, entitled: "An ordinance granting the right of way to the Omaha New Thomson & Houston Electric Light Company and regulating the same and prescribing the penalties for the violation of this ordinance" be and the same hereby is amended to read as follows, to-wit:

22

Ordinance No. 826.

An ordinance granting the right of way to the New Omaha Thomson-Houston Electric Light Company and regulating the same and prescribing penalties for the violation of this ordinance.

Be it ordained by the City Council of the City of Omaha:

SECTION 1. That the New Omaha Thomson-Houston Electric Light Company, or assigns, is hereby granted right of way for erection and maintenance of poles and wires, with all the appurtenances thereto, for the purpose of transacting a general electric light business, through, upon and over the streets, alleys and public grounds of the City of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance, Provided that said Company shall at all times, when so requested by the City authorities, permit their poles and fixtures to be used for the purpose of placing and maintaining thereon any wires that may be necessary for the use of the Fire Department or police of the City, and Provided Further, such poles and wires shall be erected so as not to interfere with ordinary travel through such streets and alleys, and Provided, that whenever it shall be necessary for any person to move along or across any of said streets or alleys any vehicle or structure of such height or size as to interfere with any poles or wires so erected,—the Company using and operating such poles or wires shall, upon receiving twelve (12) hours' notice thereof, temporarily remove such poles and wires from such place as must necessarily be crossed by such vehicle or structure; and Provided Further, that whenever the City Council, shall by ordinance, declare the necessity of removing from the public streets or alleys of the City of Omaha, the telegraph, telephone or electric poles or wires thereon constructed or existing, said Company shall within sixty (60) days from the passage of such ordinance remove all poles and wires from said streets and alleys by it constructed, used or operated.

SECTION 2. Any person who shall interfere, cut, injure, remove, break, or destroy, any of the poles, wires, fixtures, instruments or other property of the New Omaha-Thomson-Houston Electric Light Company, or association, within the corporate limits of this City shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding One Hundred Dollars.

SECTION 3. This ordinance shall take effect and be in force from and after its passage.

- 23 SECTION 4. This ordinance amending ordinance No. 826 shall take effect and be in force from and after its passage. Passed April 25th, 1899.

BEECHER HIGBY,
City Clerk.
W. W. BINGHAM,
President City Council.

Approved May 1st, 1899,

FRANK E. MOORES, *Mayor.*"

That Ordinance No. 4569 was not an ordinance granting any privileges or franchises to the New Omaha Thompson-Houston Electric Light Company, said ordinance attempting only to change the name of the grantee in Ordinance No. 826, and by reason of the premises did not confer any rights, privileges or franchises upon the said New Omaha Thompson-Houston Electric Light Company, and defendants allege that said company never had or acquired from the City of Omaha any right, privilege, license or franchise to construct, maintain or operate an electric light plant in the City of Omaha, or to use the streets, alleys or public grounds of said city for wires, conduits or poles to transmit electric currents for any purpose, and that said complainant does not now and never has acquired, held or possessed from the City of Omaha any such privilege, license, franchise or right; that the said New Omaha Thompson-Houston Electric Light Company was a trespasser upon and over the streets of said city wherever it occupied the same with poles, wires or conduits and that the same is at present true of the complainant herein.

V.

Defendants further allege that at the time Ordinance No. 4569 was passed by the Council and approved by the Mayor the said Mayor and City Council had no power to grant a franchise or any of the privileges which the complainant is now exercising in and over the streets of the city, or such privileges as the New Omaha Thompson-Houston Electric Light Company exercised in and over the streets of said city, without submitting the question of granting such license, privileges and franchises to a vote of the electors of the City of Omaha, publishing the ordinance for two weeks in two established daily papers of said city and providing for an annuity to the city based upon a fixed reasonable amount per year, or a percentage on the gross earnings of the owners of said franchises; that said provisions of the law were not complied with prior to the passage and approval of Ordinance No. 4569 nor at any other time.

VI.

Defendants further allege that as it was sought by Ordinance No. 4569 to grant and confer upon a corporation certain rights, privileges and franchises which corporation had not been organized and did not exist at the time Ordinance No. 826 was passed and approved, that said Ordinance No. 4569 by reason of not being sub-

mitted to a vote of the people and by reason of not complying with the other provisions of the state law then in force, was illegal, null and void, and conferred no rights, privileges or franchises upon the said New Omaha Thompson-Houston Electric Light Company.

VII.

Defendants further answering said bill and referring to paragraph five thereof, admit that the New Omaha Thompson-Houston Electric Light Company was a corporation organized under the laws of the state of Nebraska for the purpose of maintaining lines of wire conductors suspended upon poles for the transmission of electric current for the production of light; but defendants deny that the New Omaha Thompson-Houston Electric Light Company accepted the grant of rights, licenses and privileges which the city undertook to confer in Ordinance No. 826 and deny that said corporation was capable of taking, accepting or holding such rights, privileges or licenses; that defendants are not informed as to the amount of money expended by said corporation in the erection of an electric light plant and the purchase of machinery for generating electric currents, but admit that said corporation did expend certain sums of money for such purposes and defendants ask that so far as said allegation may be material that complainant be required to make adequate proof thereof; that said New Omaha Thompson-Houston Electric Light Company during its existence did maintain poles and wires or subways for the transmission of electric current from its central station to various points throughout the city and was engaged in furnishing such current to consumers, but defendants deny that said corporation or its successor, complainant herein, had any legal license, franchise or privilege so to do.

VIII.

Defendants further answering said bill and referring particularly to paragraph six thereof admit that in 1902 the City of Omaha enacted an ordinance requiring all electric and other wires, when used for electric lighting, heat, power and other commercial purposes, except for propelling street cars and telegraph and telephone wires, to be placed underground in certain portions of the

25 City of Omaha; that a copy of said ordinance is marked Exhibit "A" and attached to complainant's bill. That said New Omaha Thompson-Houston Electric Light Company had no right, license or franchise to occupy the streets of the city at the time said ordinance was passed for the purpose of transmitting electric current by means of poles, wires or conduits, and consequently said ordinance attached to complainant's bill and marked Exhibit "A" was in effect and in fact an attempt to confer upon said corporation a franchise to occupy the streets of the City of Omaha, and said ordinance and the passage and approval thereof being in violation of the laws of the State of Nebraska was and is null and void.

IX.

Defendants further answering said bill and referring particularly to paragraph seven thereof admit that complainant was organized prior to the expiration of the corporate franchise of the New Omaha Thompson-Houston Electric Light Company and that it was intended by those who organized said complainant corporation that it should become the successor of the said New Omaha Thompson-Houston Electric Light Company, but deny that the said New Omaha-Thompson Houston Electric Light Company sold, assigned or transferred to the plaintiff any right, license or privilege to occupy the streets of the City of Omaha with poles, wires, or conduits for the transmission of electric current, and allege the fact to be that if the said New Omaha Thompson-Houston Electric Light Company possessed any such right, privilege or franchise it could not sell or dispose of such licenses, privileges or franchises without the consent of the said City of Omaha, which consent defendants allege was not given to any such sale or transfer. Defendants admit that the plaintiff has complied with the provisions of the alleged ordinance requiring that its wires be placed underground in certain districts of the city.

X.

Defendants further answering the bill of plaintiff herein admit that for some time after 1884 electric currents for producing power and heat had not been extensively developed, and that electric currents adequate for street and inside lighting are required to be of a high potentiality; but defendants deny that the city granted the franchise as alleged in paragraph eight and deny that it had been the universal custom of companies engaged in generating and distributing electric currents for lighting to supply consumers with current for such uses as consumers may see fit to make of same; defendants deny that in transmitting current to consumers
26 it has been the universal custom to furnish the current to the consumer and permit him to use same for all purposes that he may see fit, and defendants allege that it would be entirely immaterial so far as the issues of this case are concerned even were it true. Defendants admit that the use of electric current is not always under the control of the company when upon the premises of the consumer and that it may be converted into light as termed by the plaintiff in its bill, upon the premises of the consumer; and defendants deny that the business of the company generating and distributing electric currents is merely to supply the current to the consumer, and deny that the consumer may use said current for heat, power or light as he sees fit, regardless of the desire or wishes of the company generating the same. But on the other hand defendants allege that the electric current so produced and distributed by the generator thereof may be and is controlled as to the use thereof by the consumer to whatever extent that the company producing the same may desire and see fit to control it; defendants admit that in the conversion of such current into power and heat the apparatus by which the consumer converts the current into light is often removed tempo-

rarily and the apparatus for producing power or heat is connected by him with the supply conductor from which he takes the current for light, without any action on the part of the company who supplies the current, but defendants allege that this course is not at all necessary and if the plaintiff is not entitled to furnish electric current for heat and power purposes, it is within its power to so conduct its business with its consumers that the current so furnished shall not be utilized for purposes of heat or power; and defendants admit that for the supply of consumers who require a large number of power units, the complainant maintains in said city five exclusive conductors suspended upon the same pole lines or drawn into the same conduits with its other circuits; and defendants allege that complainant has made a different use of the streets and alleys where current has been furnished for heat and power purposes from that where current has been furnished only for light in that a greater number of wires have been used on poles and in conduits and a greater volume of current has been transmitted over, along or under the streets of the city; and defendants admit that the said New Omaha Thompson-Houston Electric Light Company and that the plaintiff has continuously used the streets, alleys and public places of the city for the transmission of electric current for heat and power purposes.

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XI.

Defendants further answering said petition and referring especially to paragraph nine thereof deny that since 1884 the City has passed ordinances intended to apply to the complainant and its alleged predecessor and to consumers supplied with the electric current by each, except insofar as said ordinances were general and of general application to any and all persons and corporations who were properly using the streets, alleys and public places of the city for the distribution of electric current; and it is admitted that from time to time ordinances were passed regulating the production and distribution of electric currents of every kind and that the complainant and its alleged predecessor has complied with such regulations; and defendants admit that the city passed ordinances prohibiting persons from using electric currents for power or heat or installing apparatus therefor without filing plans and specifications for the same in the office of the City Electrician and obtaining a permit, and ordinances requiring the City Electrician to inspect installations and repairs and requiring the same to conform to the regulations of the city; and ordinances requiring the City Electrician to make certain inspections each year with reference to electricity and electrical appliances and requiring the payment of certain fees for permits; and ordinances requiring persons engaged in commercial lighting and power transmission to furnish the City Electrician at stated times a report showing each motor installation put in or discontinued during the month, and ordinances requiring drop wires designed to carry power current to be heavily insulated, and ordinances prohibiting electric light and power wires being attached to the same cross arm and not to be suspended upon the same

pole line with conductors of low potential currents like telephone and telegraph wires, and ordinances as alleged in the bill requiring various other regulations with reference to the generation, distribution and consumption of electric currents for light, heat and power; and defendants admit that the City of Omaha has issued permits for various installations to the complainant and its alleged predecessor and has received the fees therefor from consumers and others, but defendants deny that the City of Omaha knew that the New Omaha Thompson-Houston Electric Light Company or the plaintiff claimed to have a perpetual franchise, in, along and over the streets, alleys and public places of the city which authorized the use of wires, poles and conduits for the transmission of electric currents for light, heat and power. And in that regard defendants allege that the complainant has always known that it did not possess any franchise to use the streets, alleys and public grounds of the City of Omaha for poles, wires and conduits for the transmission of electric currents, and that said plaintiff and the said New Omaha Thompson-Houston Electric Light Company had nothing but a mere license or permission revocable at the will of the city, to use the streets and alleys for such purposes.

XII.

Defendants further answering said petition and referring especially to paragraph ten thereof, admit that the New Omaha Thompson-Houston Electric Light Company supplied the City of Omaha with street lights by contract and agreed to pay said city annually a sum equal to three per cent of its gross receipts from light and power business done within the city, and that plaintiff entered into a similar contract with said city, which contract is still in force, and that a copy thereof is attached to plaintiff's bill as Exhibit "B;" that under the terms of said contract the plaintiff and its alleged predecessor have paid to the city a sum of money, but whether the amount named in the bill is correct or not defendants are unable to state at present; defendants deny that the defendant city has construed plaintiff's license or permission to use its streets as a franchise or has construed any ordinance or ordinances as constituting a license or privilege to the said plaintiff to occupy any of the streets or alleys or public places of the city with its poles, wires or conduits used to transmit electric currents for heat and power purposes as anything other than a mere permission to so use its streets and alleys, revocable at the will of said city; and defendants admit that the use of electricity for the production of power and heat has been greatly developed so that the same has come to be extensively employed by the public for business and manufacturing purposes; and that many business houses have been equipped for the use of electric current in the production of power and have become dependent upon such service; defendants deny that the plaintiff has relied upon the alleged interpretation given to said alleged franchise as alleged, and that depending upon said alleged interpretation it expended large sums of money in the acquisition of the plant of the New Omaha

Thompson-Houston Electric Light Company and in the extension and equipment of said plant with new machinery, but allege the fact to be as heretofore stated, that the said plaintiff and its predecessor knew that it did not have a franchise for supplying electricity for heat and power purposes and also knew that what it terms a franchise was in fact a mere license revocable at any time at the will of said city.

29

XIII.

Defendant further answering said bill and referring especially to paragraph eleven thereof, admit that plaintiff's plant has been enlarged from time to time and that the current required for power and heat is demanded principally during the day and that the current for light is largely demanded during the night, and that said plaintiff is able to serve the public at lowest prices, but deny that plaintiff is willing or does in fact serve the public at lowest cost, and deny that plaintiff's plant has been built up in reliance upon the alleged interpretation that it possessed a perpetual franchise to use the streets and alleys of said city.

XIV.

Defendants further answering said petition and referring especially to paragraph twelve thereof, allege the fact to be that the City of Omaha has permitted the said plaintiff, the New Omaha Thompson-Houston Electric Light Company, the Omaha & Council Bluffs Street Railway Company, and numerous other persons to use its streets, alleys and other public ground for poles, wires and conduits for the transmission of electric currents, when in fact such firms, persons and corporations had either no right to so use the streets and alleys at all or a mere revocable permit so to do. Defendants allege, however, that such permission on the part of the city has not given the said plaintiff, and none of the ordinances referred to by said plaintiff in its bill have given said plaintiff or its alleged predecessor, any right, privilege or franchise to use the streets and alleys of the city for transmitting current for heat and power purposes, and that said plaintiff does not possess and never has possessed a franchise for such purposes, and to whatever extent its streets and alleys have been so used has been by its permission, which permission it had a right to revoke at any time and which permission to whatever extent it existed the said City of Omaha has revoked by Concurrent Resolution No. 2330, passed May 26th, 1908 and approved on said date. Defendants admit that the resolution set forth in said bill in paragraph twelve was passed by the Council and approved by the Mayor, and that the said defendant Waldemar Michaelson, City Electrician of said City, has served upon the plaintiff the notice set forth in said paragraph. And defendants admit that said Michaelson intends to execute the concurrent resolution aforesaid and will sever the connection of plaintiff's wire conductors so as to prevent the transmission of electric current to consumers for purposes of heat and power and prevent the restoration of the same unless said plaintiff obtains the right in the manner provided by law to furnish such electric current.

30

XV.

Defendants further allege that even if as alleged by plaintiff it possessed a franchise to use the streets and alleys of the City of Omaha for wires, poles and conduits for the transmission of electric currents from its generating plant to the consumers throughout the City of Omaha, that such franchise claimed under Ordinance No. 826 does not confer any franchise upon said plaintiff to so use the streets, alleys and public places of said city for poles, wires and conduits to transmit electric currents to Council Bluffs, South Omaha, Dundee and other places outside of said City of Omaha; that its sole right under its alleged franchise would be to occupy the streets of said city for the transmission of current at the points within said City of Omaha and that when it generates electric currents for the supply of other cities and places outside of the City of Omaha it adds an additional burden to the streets, alleys and public grounds of said city not authorized by its alleged franchise, and which would and does constitute a violation of the terms and conditions of said alleged franchise and a forfeiture thereof, which said defendant city is entitled to enforce. Defendants deny that carrying into effect the resolution set forth in the bill will interfere with any lawful right of the plaintiff or any legal right of its customers or that such action will cause said plaintiff any loss except that which may be caused by refusing to longer permit said plaintiff to trespass unlawfully upon the streets and alleys of the city and to usurp rights which in no way belong to said plaintiff.

XVI.

Defendants further allege that Ordinance No. 826 and Ordinance No. 4569, amendatory thereof, constituted mere licenses revocable at the will of said defendant city, and that at the time said ordinance was passed in 1884 the Mayor and City Council had no power, right or authority to grant a perpetual franchise to use and occupy the streets of said city and that if said ordinance or ordinances constituted or were intended to grant a franchise, they and each of them were void as being against public policy, said alleged franchises being without any provision for compensation to said city and were therefore against the public policy of the state; that said Mayor and City Council were prohibited by the laws, constitution and public policy of the state from granting a perpetual franchise in the streets
31 of the city without providing for compensation to said city, and that said ordinances not constituting a franchise were mere licenses for the use and occupancy of the city streets. And defendants further allege that the said concurrent resolution set forth in plaintiff's bill was intended as and constitutes a revocation of any permission that plaintiff or its predecessors at any time possessed to occupy the streets, alleys or public grounds of said City of Omaha with poles, wires or conduits for the transmission of electric currents for heat or power purposes. Defendants allege that plaintiff's bill is without equity and ought to be dismissed.

Wherefore, defendants and each of them pray that the bill of plaintiff be dismissed for want of equity, and that defendants and each of them be allowed their costs expended herein.

THE CITY OF OMAHA AND
WALDEMAR MICHAELSON,
By HARRY E. BURNAM,
I. J. DUNN,
JNO. A. RINE,
Their Attorneys.

Endorsed: Filed Aug. 17, 1908, Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 31st day of August 1908, Replication was filed in said case, which said Replication is in words and figures following, to-wit:

U. S. Circuit Court, District of Nebraska.

In the Circuit Court of the United States in and for the District of Nebraska, Omaha Division.

In Equity.

No. 105.

OMAHA ELECTRIC LIGHT AND POWER COMPANY

v.

THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. "Y."

The Replication of Omaha Electric Light and Power Company, Plaintiff, to the Answer of The City of Omaha and Waldemar Michaelson, Defendant.

The replicant, saving and reserving to itself, all, and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendants, for replication thereunto, says that it does and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in the law to be replied unto by the replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein
32 and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things the replicant is ready to aver, maintain and prove, as this

honorab!e Court shall direct, and humbly prays as in and by its said bill it has already prayed.

WESTEL W. MORSMAN,
Solicitor for Complainant.

Endorsed: Filed Aug. 31, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 31st day of August, 1908, Deposition of Edward F. Schurig was filed in said case, which said Deposition is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

In Equity.

OMAHA ELECTRIC LIGHT AND POWER COMPANY
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. V, Page 105.

Deposition of Edward F. Schurig.

STATE OF NEBRASKA,
Douglas County, ss:

Edward F. Schurig, of lawful age, being duly sworn, deposes and says:

My name is Edward F. Schurig; I am 45 years of age; I reside in Omaha, Nebraska; I am an electrical engineer by profession and I am now president of Standard Electric Company, doing business in the City of Omaha; I was City Electrician of the City of Omaha, commencing in 1894 and ending in 1903, and I was, during all of that time, acquainted with the system of New Omaha Thomson-Houston Electric Light Company in Omaha, and am now acquainted with the same system, owned and operated by Omaha Electric Light and Power Company. The said system was, during the whole of the said period, operated for the purpose of generating and transmitting electric currents for lighting the streets of the city and also for transmission of such currents to private corporations and persons, for such uses as such consumers desired the same. The business of Standard Electric Company, of which I am president, is the sale of electrical appliances and devices, and the installation of such devices, for the production of light, heat and power, by means of the electric current.

33 In the year 1884 the use of electric current had not been extensively and practically applied to mechanical devices, for translating its energy or force into power for the operation of machinery and was employed only in a small way and where small power was required.

Electric current results from what is technically known as electromotive force, the force which produces the transmission or flow of electric energy over a wire or other conductor of electricity. It is itself force or energy, and produces light, heat or useful mechanical power only by being conducted or allowed to flow through the appropriate translating devices.

Electric currents adequate for the production of light are required to be of high potentiality and may be utilized for either light, heat, or power, and currents generated especially for power may also be utilized for the production of light or heat.

It has been the universal custom of all companies and persons engaged in generating and distributing electric current for the production of street and inside lighting, to supply consumers with such quantity of current as may be demanded and for such use as the consumer may see fit to make of it.

In supplying private consumers, the universal method has always been to transmit current by means of wire conductors from the generator to the premises of the consumer, to be used by him for any purpose he may require, the current being sold to the consumer by measurement.

The current is converted into or made to produce light by being transmitted or allowed to flow through a lamp, upon the consumer's own premises, by means of a switch, manipulated by the consumer, which permits the current to flow through the translating device of the lamp, by which light is produced. The conversion of such electric current or energy into, or the use of the same for the production of useful mechanical power, or heat, is, and has always been done by the consumer himself, upon his own premises, by means of a switch or key manipulated or operated by him, which permits the current to flow through a motor or heating device, also controlled, owned and operated by the consumer.

The business of the producing company (except in street lighting) is merely the generation and transmission of the electric current to the premises of the consumer, for use by him, and whether the consumer employs the current for the production of light, heat, power or other purposes, the part performed by the producing company is the same—the generating, transmitting to the premises of the consumer, and sale of the electric current, measured by means of a meter.

34 The consumer may, and in practice often does, employ the same current alternately for light, heat, power, or other purposes. By attaching a lamp and switching the current "on" light is produced. By removing the lamp and attaching a heating device heat is produced. By removing the heating device and attaching a motor the electric force or energy is applied by means of the motor to the operation of machinery. All such changes are made without any action whatever by the company which supplies the electric current.

The electric company cannot prevent such uses of the current excepting by refusing to supply it.

When the business of the consumer requires the use of the electric

current for light and power or heat at the same time, the different translating devices may be connected by different conductors, so that identically the same current delivered to the premises of the consumer by means of the same conductor is divided and distributed by the consumer, upon his own premises, and applied to such uses as he desires.

The use of the streets and public ways of a city for the transmission of electric current is exactly the same, whether the current be employed by the consumer for the production of light, heat, power, or other purposes, or for each of such purposes, but the enlarged use of electric energy may require more wire conductors than if the use was less.

During the whole of the period when I was city electrician of the City of Omaha the New Omaha Thomson-Houston Electric Light Company was engaged in transmitting electric current and selling the same to consumers generally, for the production of power as well as light, and I had official knowledge of the fact, and the Mayor and Council of said city had such knowledge and passed ordinances for the regulation of such business. I made many official inspections each year, during said period, at the time such installations were made and periodically after the same were made. The ordinances of the city made it my duty to make such inspection and invested me with power to approve or disapprove such installations, to prohibit the same when not properly and safely made, and to prohibit the use of any that became unsafe, and I required many such installations to be made in conformity to the regulations prescribed by the Mayor and Council, and to my own knowledge of what was necessary to make the same safe. I approved hundreds of such installations during my term of office and no objection was ever made to any if properly installed.

It was never claimed, during my term of office, by the defendant city, that New Omaha Thomson-Houston Electric Light Company had no franchise or license to occupy the streets and alleys of said city for the transmission of electric current, which was to be
35 used for the production of power, or heat, or that its use of the streets was limited to any particular use or uses of the electric current whatever.

The Omaha Electric Light and Power Company has all of the time, since August 1, 1903, been engaged in the business of transmitting electric current to consumers generally, throughout the City of Omaha, for use in the production of power, heat, and other purposes than light, and said company and New Omaha-Thomson-Houston Electric Light Company have, to my knowledge, expended large sums of money in the acquisition, enlargement and improvement of the means and facilities for generating, distributing and reducing the cost of such electric current to persons desiring the same for the production of power and in developing the said business.

The defendant City of Omaha has, during all of the times aforesaid, granted permits and taken fees for such permits for the installation of appliances, devices and motors for the production of heat and power and still issues such permits.

I am engaged in the business of superintending and making such installations for any persons who desire my services and am duly licensed by the said defendant city.

There has never been any company or person engaged in the business of generating and distributing electric current for sale to the public, in the City of Omaha, but the New Omaha-Thomson-Houston Electric Light Company and Omaha Electric Light and Power Company, excepting that a street car company has distributed such current to a few consumers for both light and power, and, I believe Omaha Illuminating Company did a small business prior to 1891.

I have no knowledge, so far as I can now recall, of any other matter or thing which may be of benefit or advantage to either party to this suit or material to the matter in controversy, so help me God.

EDW. F. SCHURIG.

Subscribed and sworn to by Edward F. Schrig, before me, this 29th day of August, A. D. 1908.

[SEAL.]

HERBERT L. MARTIN,
Notary Public.

Fee \$2.50 Paid by W. W. Morsman.

Endorsed: Filed Aug. 31, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 31st day of August, 1908, Deposition of Henry A. Holdrege was filed in said case, which said Deposition is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

36

In Equity.

OMAHA ELECTRIC LIGHT AND POWER COMPANY
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. Y, Page 105.

Deposition of Henry A. Holdrege.

STATE OF NEBRASKA,
Douglas County, ss:

Henry A. Holdrege, of lawful age, being duly sworn deposes and says as follows, to-wit:

My name is Henry A. Holdrege; I am 35 years of age; I reside in Omaha; I am now, and since January 1, 1904, I have been General Manager of Omaha Electric Light and Power Company, the plaintiff in the above entitled suit; I am an electrical engineer by profession; I graduated in the Massachusetts Institute of Technology, in 1885. I spent one year thereafter as Assistant Instructor in the

same institution, and have been, all of the time since, engaged in practical work as an electrical engineer. I am well acquainted with the system of the plaintiff company in Omaha, and I am acquainted with the laws which govern the generation, distribution and application of electricity and the history of its development and practical adaptation to the production of light, heat, and power for the operation of machinery.

It has been the uniform custom of companies engaged in the generation of electric current for the production of light to also sell the electric current to consumers for the production of power or any other purpose for which it was desired.

I have never known or heard of any company or person engaged in the production and distribution of electric current for purposes of lighting which attempted to dictate the purpose for which any person should employ the electric current or to restrict its use by such person to the production of light.

The application of electric power to stationary machinery was not much understood or developed in 1884 and for several years thereafter, but as electric currents employed in the production of light are required to be of high potential and may be utilized for producing either heat or power, as well as light, all companies have supplied and sold such electric current to consumers for such purposes, whenever demanded.

Light, heat and power are produced only by conducting the electric current through the appropriate translating device and the transmission of the electric current through the public streets and ways is accomplished by the same means and instrumentalities, whether it be employed by the consumer for one purpose or for another.

37 In supplying individual consumers with electric current the method is the same whether the consumer employs such current for the production of light, heat or power. The producing company transmits the current by means of its wire conductors constructed in circuits to the premises of the consumer in such volume or quantity as he may require, and the consumer converts it to his use as light, heat, or power, according to his wants, upon his own premises, by means of the appropriate translating devices. In the actual business of the plaintiff company there are some minor exceptions, in the case of illuminated signs, these being owned by the company and lighted and extinguished by it, the company receiving an agreed sum monthly for the whole service; but in practically all of the lighting by electricity, in places of business and residences, the Electric Company does no more than generate the current and conduct or transmit it to the premises of the consumer, where it is sold to him by measurement.

Practically all of the business or actual operation of every Electric Light Company (excepting street lighting) consists merely in generating and transmitting electric current to the premises of the consumer, to whom it is sold by measurement, and it is the same whether the current be employed for the production of light, heat or power, and the actual business of such companies has never been differently conducted.

The electric current is converted or made to produce light by being conducted by wire conductors through a lamp upon the consumer's premises, and controlled by a switch manipulated by the consumer, who thus opens or closes the flow of current from the source of supply to the lamp, at will, and thus produces light as it is required.

The electric current is also converted into power or heat by the consumer, upon his own premises, and in the same manner, permitting the current to flow from the source of supply through a motor or heating device, owned and operated by the consumer, and by which he thus produces power or heat as it is wanted.

Whether the consumer desires light, heat or power, the part performed by the Electric Company is the same, viz: the generating, transmitting to the premises of the consumer, and sale of the electric current, measured by meter.

The consumer may, and in practice often does, employ the same circuit alternately for the production of light, heat or power, as he may require one or the other. By attaching a lamp and switching the current "on," light is produced by the flow of the electric current through the translating device of the lamp. By removing the lamp and attaching a heating device heat is produced. By removing the heating device and attaching a motor the electric force or energy is applied by means of the motor to the operation of the machinery. All such changes are made without any action whatever by the company which supplies the electric current, excepting, as I have already stated, with reference to some illuminating signs.

The electric company can not prevent such uses of the current, otherwise than by refusing to supply it.

When the business of the consumer requires the use of the electric current for light and power, or heat,—that is, for two or more purposes at the same time, the different translating devices may be connected by separate conductors to the same supply circuit, so that identically the same current delivered to the premises of the consumer by means of the same conductor is divided and distributed by the consumer, upon his own premises, and applied to such uses as he may desire.

The use of the streets and public ways of a city for the transmission of electric current is exactly the same whether the current be employed by the consumer for the production of light, heat, power or other purposes, or for each of such purposes; but the enlarged use of electric energy may require more conductors and conductors of larger capacity than if the use was not thus enlarged.

The use of the electric current for the production of power applied to stationary machinery has been rapidly and extensively developed within a few years past, and is being still greatly developed by the invention of motors and devices not before used for the conversion of such current into power or heat and by extending the use of such devices and instrumentalities to a great variety of business operations; and the business of Omaha Electric Light and Power Company has been greatly developed since it succeeded to the property and business

of New Omaha-Thompson-Houston Electric Light Company, so that now its income from the sale of current which is applied to the production of power is equal to about $\frac{1}{4}$ of its whole gross income. Among the enterprises to which the company supplies electric current which is employed by the consumer for the production of power, are grain elevators, grist mills, passenger elevators, and almost every variety of stationary machinery, including also small devices like electric fans, sewing machine motors, and heating and cooking devices. The company has, in the City of Omaha, approximately, 2,500 patrons who, in the prosecution of their business, make use of the electric current for the production of power or heat, or both.

39 The company has constructed, extended and improved its generating plant and its distributing system, including its underground conduits, at very great expense, with a view not merely to such business as is now done, but also with a view to the future demand; and the business of distributing such electric currents for such uses is of great value to the public and especially to business requiring power for the operation of machinery of any kind. The investment of the company made necessary by the development of such business, and in anticipation of the growth of the same, exceeds the investment which would have been required if the business of the company were restricted to the sale of current for the production of light by a sum not less than 500,000 dollars.

Since about 1895, to my personal knowledge, and as I am informed and believe, since about 1891, the New Omaha Thomson-Houston Electric Light Company and Omaha Electric Light and Power Company have been the only companies or persons engaged in generating, transmitting and selling electric current to persons and corporations within the City of Omaha for the purposes of light, heat and power, excepting that a street car company has supplied a few persons with electric current for both light and power, but, as I am informed and believe, without any franchise, license or privilege granted to it by the City of Omaha, for the transmission of electric current through the streets and alleys of said city, for any other purpose than that of propelling street cars.

The City of Omaha has, by its Mayor and Council passed many ordinances and regulations governing the use of the electric current for the production of power and heat and the installation of conductors, motors and devices for the translation of such current into power and heat and all such installations have been required to be made under supervision and subject to inspection of the City Electrician, who, by such ordinances has been invested with power to approve or disapprove the same and to require conformity with the regulations established by said city, and to conform in construction, to the judgment and opinion of such City Electrician, in order that the same should be made safe to property and persons. I do not now recall any other fact material or of benefit to either party of this suit, so help me God.

HENRY A. HOLDREGE.

Subscribed and sworn to by Henry A. Holdrege, before me, this 28th day of August, 1908.

[SEAL.]

HERBERT L. MARTIN,
Notary Public.

Fee, 50c., paid by W. W. Morsman.

40 Endorsed: Filed Aug. 31, 1908. Geo. H. Thummel,
Clerk.

Thereupon afterwards, to-wit: On the 24th day of September, 1908, Deposition of William F. White was filed in said case, which said Deposition is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

In Equity.

OMAHA ELECTRIC LIGHT AND POWER COMPANY
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. Y, Page 105.

Deposition of William F. White.

STATE OF NEW YORK,
County of —, ss:

William F. White, of lawful age, being duly sworn, deposes and says as follows, to-wit:

My name is William F. White; I reside in the City of New York, and am a Director, and a member of the firm, of J. G. White & Company, Incorporated.

I am an electrical engineer and a graduate, in the class of 1887, of The Pennsylvania State College, which college has conferred on me the degree of "Electrical Engineer."

I have been engaged in the business of an electrical engineer practically all of the time since 1887; I was vice-president, and later president, and general manager of New Omaha Thomson-Houston Electric Light Company during the period commencing January 1, 1895, and until the 31st day of December, 1899, and I lived in Omaha during that period and had the active management of the business of that company.

I removed from Omaha to Cincinnati and became connected with The Cincinnati Edison Electric Company as vice-president and general manager, which company did most of the electric lighting in the city of Cincinnati, and continued in said employment until the 1st day of May, 1902, when I came to New York, N. Y., as vice-president of The North American Company.

I am acquainted with the natural laws governing electricity and

the history of its development and practical adaptation to the production of light, heat and power for the operation of machinery and other uses, as such laws are now known and understood by electricians.

During the whole period when I was connected with New Omaha Thomson-Houston Electric Light Company, as I have stated, the system of said company in Omaha was operated for the purpose of generating and transmitting electric current, not merely for lighting public streets, but also for the sale of the same to private corporations and persons for such uses as such consumers desired to make of the same, including power and heat.

The company occupied the streets and alleys of the city under an ordinance of the city passed in 1884, in which the name of the grantee was written as "Omaha New Thomson & Houston Electric Light Company," granting the use of the streets and alleys. The name as thus written was a clerical mistake which was not discovered until 1899, when the ordinance was amended by the Mayor and Council of the City, for the purpose of correcting this mistake, and so that it should read New Omaha Thomson-Houston Electric Light Company, as grantee. There was not at any time, any company named "Omaha New Thomson & Houston Electric Light Company," and New Omaha Thomson-Houston Electric Light Company was the only company in Omaha whose corporate name was at all similar and the only company that ever claimed or exercised any rights under or by virtue of said ordinance.

It has been the uniform custom of all companies and persons engaged in generating and distributing electric current for the production of light to supply consumers with such quantity of current and for such use as the consumer might see fit to make of it.

Electric currents adequate for the production of light may be utilized for the production of heat and power, as well as light, and it has been the universal practice of companies furnishing current to private corporations and persons for the production of light to also furnish such current for the production of heat and power, as rapidly as the devices for translating electric energy into heat or power have been made practicable and as the demand for such uses had developed.

The business of furnishing electric current for private corporations and natural persons for the production of light, and the furnishing of such current for the production of heat and power, is the same thing so far as the electric company is concerned. It consists in generating and transmitting the current to the premises of the consumer and the sale of the same to him by measurement, whether he employs it for the production of light, heat and power.

The application of electric energy to stationary machinery was not much understood or developed in 1884 and for several years thereafter; but new inventions and devices have been produced for the translation of electric energy to such an extent that the business of furnishing the electric current has been very greatly developed and the use thereof for the production of power and heat has become very important to the public, as well as

to the electric companies of the country, electric power being now very generally used for the operation of all kinds of machinery.

Light, heat and power are produced from electricity only by conducting the electric current through the appropriate translating devices, and the transmission of the electric current through the public streets and ways is accomplished by identically the same means and instrumentalities, whether it be employed by the consumer for one purpose or for another.

The producing company transmits the current by means of its wire conductors, constructed in circuits, to the premises of the consumer, in such volume or quantity as he may require, and the consumer converts it to his use as light, heat or power, according to his wants, upon his own premises, by means of the appropriate translating device operated and controlled by himself. In practically all of the lighting by electricity (excepting street lighting) the electric company does practically no more than generate the current and conduct or transmit it to the premises of the consumer, where it is sold to him by measurement and practically all of the business or actual operation of every electric light company (excepting its street lighting) consists of nothing more, and it is the same whether the current be employed for the production of light, heat or power, and the actual business of such companies has never been differently conducted.

The electric current is converted or made to produce light by being conducted by wire conductors through a lamp upon the consumer's premises, and controlled by a switch manipulated by the consumer, who thus opens or closes the flow of the current from the source of supply to the lamp, at will, and thus produces light as he requires it.

The electric current is also converted into power or heat by the consumer, upon his own premises, and in the same manner, permitting the current to flow from the source of supply through a motor or heating device owned and operated by the consumer, and by means of which he thus produces power or heat as it is wanted.

Whether the consumer desires light, heat or power, the part performed by the electric company is the same, viz: the generating, transmitting to the premises of the consumer, and sale of the electric current, measured by a meter.

The consumer may, and in practice often does, (in fact in a large proportion of cases, so far as numbers is concerned) employ the same circuit for the production of light, heat or power, as he may

require the use of one or the other. By attaching a lamp and
43 switching current "on" light is produced by the flow of the electric current through the translating device of the lamp.

By removing the lamp and attaching a heating device heat is produced. By removing the heating device and connecting a motor the electric force or energy is applied by means of the motor, to the operation of machinery. All such changes are made without any action whatever by the company which supplies the electric current. The electric company can not prevent such changes or uses of current otherwise than by refusing to supply it. The consumer may obtain his translating device, whether it be a lamp, heating device,

or motor, at any place in the market, and make such necessary installations upon his own premises as may be necessary to connect the same with the supply circuit and to enable him to use electric devices according to his wants.

If the business of the consumer requires the use of the electric current for two or more purposes at the same time the different translating devices may be connected by him to the same supply circuit so that identically the same current delivered to the premises of the consumer, by means of the same conductor, is divided and distributed by the consumer himself, upon his own premises and applied to the uses his business requires.

The use of the streets and public ways of a city for the transmission of electric current, is exactly the same, whether the current be employed by the consumer for the production of light, heat or power, or for all of such purposes; but as the use of the electric current increases such use may require more conductors or conductors of larger capacity than if the use was less. The use of electric current for the production of power applied to stationary machinery has been rapidly and extensively developed and is being still greatly developed by the invention or improvement of motors and devices not before used for the conversion of such current and by extending the use of such devices and instrumentalities to a great variety of business and manufacturing operations. The business of New Omaha Thomson-Houston Electric Light Company, in the transmission and sale of electric current which the consumers applied to the production of power or heat, developed and increased each year during the whole of the time that I was connected with that company, and the company expended large sums of money in improving, developing and increasing its generating plant and distributing system in consequence of such development of its business and in reliance upon its right under and by virtue of its grant from the City of Omaha to transmit, by means of its wire conductors, through the streets and alleys of the city, electric current for sale to consumers, regardless of the use which the consumer might make of the same.

During the period that I was connected with New Omaha Thomson-Houston Electric Light Company the company made, in the City of Omaha, many installations and connections designed for the application of the electric current to the production of power and heat and every such installation was made under the supervision of and after inspection and upon permit granted by the city electrician of said city, and pursuant to ordinances enacted by the mayor and council of said city, for the regulation of such installations and during said period the city electrician of said city inspected hundreds of such installations prior to and at the time they were being made and periodically afterwards.

It was never claimed by or on behalf of the city of Omaha, during the time that I was connected with New Thomson-Houston Electric Light Company that the company did not have the right, by virtue of the municipal grant by the city to transmit electric current to consumers to be applied by them in the production of heat

and power, or that there was any limitation or restriction whatever on the right of the company to transmit electric current through the streets and alleys of the city, excepting such limitation as might be imposed by the city in the exercise of its police power for the safety of persons and property and for the protection of the right of the public in the streets and alleys of the city. During the whole of the time that I was connected with the New Omaha Thomson-Houston Electric Light Company the city and its officers not only acquiesced in the use of electric current for the production of power, and the transmission of the same through the streets and alleys by that company, by means of its distributing system, to hundreds of persons and with full knowledge of each case, but said city granted a permit for each installation.

I do not now recall any other fact or matter material or of benefit to either party to the suit, so help me God.

WILLIAM F. WHITE.

Subscribed and sworn to before me this 22nd day of September, A. D. 1908.

F. F. RUFF,
Notary Public, New York County.

Endorsed: Filed Sep. 24, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit:—On the 31st day of August, 1908, Deposition of Samuel E. Schweitzer was filed in said case, which said Deposition is in words and figures following, to-wit:—

45 In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

In Equity.

OMAHA ELECTRIC LIGHT AND POWER COMPANY
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSEN.

Doc. Y, Page 105.

Deposition of Samuel E. Schweitzer.

STATE OF NEBRASKA,
Douglas County, ss:

Samuel E. Schweitzer, being duly sworn, deposes and says as follows, to-wit:

I am now Secretary and Treasurer of Omaha Electric Light and Power Company, the plaintiff above named; I was employed as Cashier and Bookkeeper of New Omaha Thomson-Houston Electric Light Company, commencing December 5, 1889, and I have been continuously employed by said company, or by the plaintiff com-

pany, until the present time. The New Omaha Thomson-Houston Electric Light Company commenced business, as is shown by its books and records, in 1885, and prior to August 1, 1903, said company had expended in the City of Omaha in the acquisition and erection of its plant and machinery for generating electric current, and for the construction of its system of pole lines, conduits, wire conductors, and other instrumentalities for the transmission of such electric currents throughout the City of Omaha, more than the sum of \$1,500,000.

Said system was continuously maintained and operated by New Omaha Thomson-Houston Electric Light Company, in, upon and under the streets and alleys of the City of Omaha, until August 1, 1903, when said company transferred its property and franchises to, and was succeeded by, the plaintiff, Omaha Electric Light and Power Company.

The Omaha Electric Light and Power Company has greatly extended and improved the generating plant and whole system aforesaid and has continuously operated in, through and under the streets of the City of Omaha to the present time, and has expended in the acquisition of the property and franchises of the New Omaha Thomson-Houston Electric Light Company, and in such extensions and improvements, more than the sum of \$2,500,00-, within the limits of the City of Omaha.

The New Omaha Thomson-Houston Electric Light Company and the plaintiff, Omaha Electric Light and Power Company, together, have expended more than \$400,000, in the construction of
46 conduits and an underground system for electric conductors within said City, in compliance with an ordinance of said city, passed in 1902, requiring the placing of all such conduits, where used for electric lighting, heat, power and other commercial purposes, to be placed underground in a large district of said city, a copy of which ordinance is attached to the plaintiff's Bill of Complaint in this cause.

At the time of passing said ordinance and at all times prior and subsequent thereto the New Omaha-Thomson-Houston Electric Light Company, and the plaintiff company, have been the only corporations or persons engaged in the City of Omaha in the generating and transmitting of electric current for the production of light, power and heat, and the only companies having any franchise, license, or privilege granted therefor by the City of Omaha, excepting that a Street Car Company has generated electric currents during a part of said period, and sold the same to private corporations and persons, to a small extent, for the production of light and power and Omaha Illuminating Company did a small business prior to the year 1891. Upon information and belief I state that said Street Car Company had no franchise, license or privilege granted to it by the City of Omaha for such use of the streets and alleys of said city.

The New Omaha Thomson-Houston Electric Light Company transferred all of its property and franchises (excepting its franchise to be a corporation) to the plaintiff, Omaha Electric Light

and Power Company, by a writing dated and executed July 29, 1903, but to take effect August 1, 1903, a true copy of which writing I now produce and which is attached to this deposition and marked "A."

The New Omaha Thomson-Houston Electric Light Company, during all of the time after December 5, 1889, (and prior thereto, commencing in 1885, so far as I am informed) and until August 1, 1903, and the Omaha Electric Light and Power Company during all of the time since August 1, 1903, have been engaged in the business, in the City of Omaha, of lighting the public streets of said city, under contract with the city, and also in transmitting electric current by means of the system aforesaid, to private corporations and persons, for consumption by them for light, power, or heat, as the said persons saw fit or found it convenient or advantageous to use the same. The use of the electric current for the production of power and heat has been rapidly and extensively developed since 1885, by the invention of motors and devices not before used for the conversion of such currents into power or heat and the business of the plaintiff company has been developed so that now its gross income from the sale of electric current, which is employed by consumers for the production of power only, amounts to \$116,000 per annum, which is about 1-4 of the whole gross annual revenue of the plaintiff, from the sale of current consumed or used in the City of Omaha.

The plaintiff, Omaha Electric Light and Power Company has incurred large expense in the acquisition of facilities for the production of electric current thus transmitted and sold, and the consumers have, in many instances, incurred large expense in the acquisition of motors, machinery, and buildings for using the same. The current is employed in the production of power for the operation of grain elevators, mills, passenger elevators in buildings, electric automobiles, stationary engines and motors, manufacturing machinery of all kinds and in a great variety of uses, requiring a small number of power units. The business has all been developed with the knowledge of the defendant city and its officers, who have issued permits for and have inspected installations, when made, and at periods afterwards.

The business of the plaintiff company, so far as it consists in supplying current to private corporations and persons, is merely the transmission of such electric current to and upon the premises of, and sale of the same to such consumers by measure. The consumers themselves install upon their own premises such motors, engines, lamps or other device as their business requires, and the plaintiff company transmits the current to the premises by means of distributing conductors, where it is measured to the consumer by a meter, and where by means of a switch, it is connected by the consumer with the apparatus he desires to employ, whether it be for the production of light, heat, or power, and disconnected by means of the same switch when he wishes to discontinue the use.

Plaintiff company has no power to dictate the use or to prevent

the use of the current for the production of power or any other purpose except by cutting off the supply entirely.

The transmission of the current is accomplished by the same methods, whether it be employed for the production of power, light or heat, and the transmission of the current for use in the production of power does not require any different use of the streets and alleys of the city from that which is required in the transmission of current for use in the production of light. The wire conductors are carried through the same conduits or suspended upon the same pole lines and in the greater number of cases it is taken from the same circuit for light, heat and power.

I have no knowledge of any electric light company, and have never heard of one, engaged in serving private corporations and persons anywhere, which did not sell electric current for any purpose the consumer desired it for, and I believe it is, and that it has
48 always been, a part of the business of every such company, from the time it was discovered the current could be practically applied for the production of power, heat or other purposes than light, and that it was so prior to the passage of Ordinance No. 826, by the Mayor and Council of the City of Omaha, in the year 1884.

The New Omaha Thomson-Houston Electric Light Company and the plaintiff, Omaha Electric Light and Power Company, have paid to defendant city a percentage of gross receipts, pursuant to contract with such city, a copy of which is attached to the complainant's Bill of Complaint, as shown by vouchers, which I now produce and true copies of which are attached as part of this my deposition, and marked "B", "C", "D", "E", "F", "G", respectively, and that, of the aggregate of said payments, the sum of \$12,619 was paid on account of gross receipts for current sold and employed in the production of power.

At the time of the organization of Omaha Electric Light and Power Company, and on June 27, 1903, the plaintiff company caused a duly certified copy of its Articles of Incorporation to be transmitted to the secretary of state for the State of Nebraska, with the request that the same be filed and recorded in that office, and offered to pay all legal fees therefor. The secretary of state then returned the same, refusing to file or record the same, holding, under the advice of the Attorney General of the State of Nebraska, that no law of the state authorized or required the filing of Articles of Incorporation in his office by a corporation created by another state, unless such corporation wished to become a domestic corporation of the State of Nebraska and complied with the law of the state in respect thereto.

A true copy of a letter written by Edgar M. Morsman, Jr., transmitting said Articles of Incorporation, and marked "H", and a true copy of said Articles of Incorporation so transmitted, and marked "I", and a true copy of a letter written by George W. Marsh, Secretary of State, addressed to Edgar M. Morsman, and marked "J", and a true copy of a letter written by W. W. Morsman, addressed to the said George W. Marsh, Secretary of State, again transmitting said Articles of Incorporation, and requesting that the same be filed

and recorded, and marked "K", and a true copy of the reply of said George W. Marsh, as Secretary of State, returning and again refusing to file and record the said Articles of Incorporation, marked "L", are hereto attached as part of this my deposition, so help me God.

SAMUEL E. SCHWEITZER.

49 Subscribed and sworn to by Samuel E. Schweitzer, before me, this 26th day of August, A. D. 1908.

[SEAL.]

HERBERT L. MARTIN,

Notary Public.

Fee, 50c., paid by W. W. Morsman.

EXHIBIT "A."

Know All Men By These Presents:

That for a good and valuable consideration paid to the New Omaha Thomson-Houston Electric Light Company (a corporation under the laws of Nebraska) by the Omaha Electric Light and Power Company (a corporation under the laws of Maine) the receipt whereof is hereby acknowledged, said New Omaha Thomson-Houston Electric Light Company hereby sells, assigns and transfers unto said Omaha Electric Light and Power Company all the property and assets of said New Omaha Thomson-Houston Electric Light Company, of every kind and description, including all its rights, privileges, franchises (other than the franchise to be a corporation), contracts, business and good will as a going concern.

To have and to hold the same unto said Omaha Electric Light and Power Company, its successors and assigns, to its and their own absolute use forever.

This transfer of property and business, though presently made, is to be considered as taking effect as of August 1st, 1903.

This transfer of business and property is to be made subject to all the debts and liabilities of the vendor company existing on said first day of August, including obligations under leases and contracts and any causes of action against it, which liabilities and obligations the vendee assumes and agrees to pay as a part of the consideration of this instrument.

The foregoing sale and transfer are intended to be made in pursuance of an agreement heretofore made by and between the vendor and vendee, as evidenced by a request and proposal submitted by said Omaha Electric Light and Power Company, under date of July 17, 1903, to said New Omaha Thomson-Houston Electric Light Company, and by a resolution and vote, the former adopted by all the stockholders of said New Omaha Thomson-Houston Electric Light Company at a meeting duly held for the purpose at Omaha, Nebraska, on the twentieth day of July, 1903, and the latter passed unanimously by the Directors of that Company at a meeting held on the same day (July 20, 1903) every member of the Board being present and voting. Said request and proposal, and also said resolution of stockholders and vote of Directors, are severally to be taken as if incorporated herein.

In Witness Whereof, said New Omaha Thomson-Houston Electric Light Company has caused these presents to be executed in its behalf, under its corporate seal, by Frederick A. Nash, its President, and S. E. Schweitzer, its Secretary, this 29th day of July, 1903.

Executed in duplicate.

NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY,

By FREDERICK A. NASH, *President*.

Attest:

S. E. SCHWEITZER,
Secretary.

The Omaha Electric Light and Power Company, named in the foregoing instrument of transfer, hereby accepts the same, and assumes and agrees to pay the debts and liabilities of said New Omaha Thomson-Houston Electric Light Company in accordance with the provisions contained and referred to in said instrument.

In Witness Whereof, said Omaha Electric Light and Power Company has caused its corporate seal to be hereto affixed and attested by its Secretary, and these presents to be signed in its behalf by E. L. Carr, its President, hereunto duly authorized.

Executed in duplicate.

OMAHA ELECTRIC LIGHT AND POWER COMPANY,

By ERNEST L. CARR, *President*.

Attest:

HENRY F. KNIGHT,
Secretary.

51

EXHIBIT "B."

The New Omaha Thomson-Houston Electric Light Company to
A. H. Hennings, City Treas., Dr.

Address, Omaha, Neb.

1902. For 3% bonus on gross receipts for 1902 per contract.

Gross earnings for arc and incandescent light service, exclusive of business done with the City	\$144,459.09
Gross earnings for power service.....	48,546.38
	<hr/>
	\$193,005.47
Amount uncollected for arc and incandescent service.....	\$2,234.90
Amount uncollected for power service.....	1,307.37
	<hr/>
	189,463.20
3%	5,683.90

Correct:
S. E. SCHWEITZER,
Sec'y & Treas.

Approved:

Gen'l M'g'r.

Approved:
F. A. NASH,
President.

OMAHA, NEBRASKA.

Received March 3, 1903, from The New Omaha Thomson-Houston Electric Light Company Fifty-six Hundred Eighty-three and 90-100 Dollars in full for the above.

A. H. HENNINGS,
City Treasurer.
F. B. BRYANT, Deputy.

52

EXHIBIT "C."

Voucher Check.

To A. H. Hennings, City Treas.
Address, Omaha, Neb.

Invoice No. —.

1903.

For duly authorized account as per invoices on file in Treasurer's office.

Dec. 31. Bonus as per contract on Gross Receipts within City of Omaha for year 1903.

Gross receipts from Arc Service.....	36,431.97
" " " Incandesc. Service.....	159,261.79
" " " Power "	49,303.86

 244,997.62

Deduct

Amount received from city..... 37,529.44

 207,468.18

3% on above total 6,224.05

Approved for payment:	Examined and entered:	Date issued:
F. A. NASH,	S. E. SCHWEITZER,	Jan. 15, 1904.
President.	Sec'y and Treas.	No. 1133.

Received from Omaha Electric Light and Power Company \$6,224.05 Sixty-two Hundred Twenty-four and 05-100 Dollars in full payment of above account.

(Sign here)

A. H. HENNINGS, City Treas.,
By I. L. BEISEL, Deputy.
OMAHA ELECTRIC LIGHT
AND POWER CO.
S. E. SCHWEITZER, Treasurer.

53

EXHIBIT "D."

Voucher—Check.

To A. H. Hennings, City Treas.
Address, Omaha, Neb.

Invoice No. —.

1904.

Dec. 31. For duly authorized account as per invoices on file in
Treasurer's office.

Bonus as per terms of City Contract for 1904.

Gross receipts from Arc & Inc. Service.....	230,428.01
" " " Power "	55,407.23
Total.....	285,885.24
Less amount received from City.....	51,502.70
	<hr/>
	234,382.54
3 per cent. on this amount.....	7,031.48

Approved for payment:	Examined and entered:	Date issued:
F. A. NASH,	S. E. SCHWEITZER,	Jan. 17, 1905.
<i>President.</i>	<i>Sec'y and Treas.</i>	No. 3525.

Received from Omaha Electric Light and Power Co. \$7,031.48
Seven Thousand Thirty-one and 48-100 Dollars in full payment of
above account.

(Sign here)

A. H. HENNINGS,
City Treasurer.
I. L. BEISEL, *Deputy.*
OMAHA ELECTRIC LIGHT
AND POWER CO.,
By S. E. SCHWEITZER, *Treasurer.*

54

EXHIBIT "E."

Voucher Check.

To A. H. Hennings, City Treasurer.
Address, Omaha, Neb.

Invoice No. —.

1905.

Dec. 31. For duly authorized account as per invoices on file in
Treasurer's office.

Bonus as per Terms of City Contract for 1905.

Gross Receipts from Arc & Inc. Service.....	268,127.59
" " " Power "	64,577.95

Total	332,705.54
Less amount received from city.....	51,058.73

281,646.81

3% on this amount..... 8,449.40

Approved for payment:	Examined and entered:	Date issued:
F. A. NASH,	S. E. SCHWEITZER,	Jan. 29, 1908.
President.	Sec'y and Treas.	No. 5976.

Received from Omaha Electric Light and Power Co. \$8,449.40
Eighty-four Hundred Forty-nine and 40-100 Dollars in full payment
of above account.

(Sign here)

A. H. HENNINGS, *City Treas.*I. L. BEISEL, *Deputy.*OMAHA ELECTRIC LIGHT
AND POWER CO.,By S. E. SCHWEITZER, *Treasurer.*

55

EXHIBIT "F."

Voucher Check.

To Robt. O. Fink, Treasurer.
Address, Omaha.

Invoice No. —.

1906.

Dec. 31. For duly authorized account as per invoices on file in
Treasurer's office.

Rebate as per Terms of City Contract for 1906.

Gross receipts from Arc-Inc. & Power Service..	430,753.34
Less amount received from city.....	67,442.55

363,310.79

3% on this amount..... 10,899.32

Approved for payment:	Examined and entered:	Date issued:
F. A. NASH,	S. E. SCHWEITZER,	Jan. 22, 1907.
President.	Sec'y and Treas.	No. 8456.

Received from Omaha Electric Light and Power Co. \$10,899.32
Ten Thousand Eight Hundred Ninety-nine and 32-100 Dollars in
full payment of above account.

(Sign here.)

ROBERT O. FINK,
City Treasurer.
I. L. BEISEL, *Deputy.*

Not over twelve thousand \$12,000\$.

When properly receipted
this voucher becomes a check,
payable through Nebraska
National Bank, Omaha.

OMAHA ELECTRIC LIGHT
AND POWER CO.,
By S. E. SCHWEITZER,
Treasurer.

56

EXHIBIT "G."

Voucher Check.

No. 10,842.

OMAHA, NEB., Jan. 21, 1908.

Pay to the order of Frank Furay, City Treasurer, \$13,458.33 Thir-
teen Thousand Four Hundred Fifty-eight and 33-100 Dollars.

Not over fourteen thousand \$14,000\$.

To Nebraska National
Bank, Omaha.

Countersigned:

By F. A. NASH,
President.

OMAHA ELECTRIC LIGHT
AND POWER CO.,
By S. E. SCHWEITZER,
Treasurer.

To Frank Furay, City Treas-
urer, Omaha.

Voucher Check No. 10,842.
\$13,458.33.

Date.	Memo.	Distribution of charge.
1907.		
Dec. 31.	Rebate as per Terms of City Contract for 1907, Gross re- ceipts from Arc, Inc. & Power Serv- ice.....	City Royalty, 13,458.33
	512,398.57	
	Less amount rec'd from City.....	
	63,787.45	
	<hr/> 448,611.12	
	3% on this amount.....	13,458.33

57

EXHIBIT "H."

"H."

The Sec'y of State, Lincoln, Nebr.

DEAR SIR: Enclosed find a certified copy of the Articles of Incorporation of the Omaha Electric Light & Power Company, a Maine corporation. I desire to have these filed in your office and upon receipt of notice of your fees will remit promptly.

Very truly yours,
(Sgd.)

EDGAR M. MORSMAN, JR.

July 27, 1903.

EXHIBIT "I."

"I."

PORTLAND, MAINE, July 24, 1903.

To the Honorable the Secretary of State, Lincoln, Nebraska:

The undersigned, Clerk of the Omaha Electric Light and Power Company, a corporation duly organized and existing under the laws of the State of Maine, with its principal office in Portland in the County of Cumberland in that State, hereby certifies that at a meeting of the Board of Directors of said corporation duly held on the 23rd day of July, 1903, a vote in the following terms was unanimously passed, viz:

Voted that to the end that this corporation (Omaha Electric Light and Power Company, organized under the laws of the State of Maine) may begin and carry on business in the State of Nebraska as a foreign corporation, the Clerk, Charles H. Tolman, cause to be filed and recorded in the office of The Secretary of State, at Lincoln, Nebraska, the Articles of Incorporation already adopted by the Company, the same being shown in a copy certified by the Secretary of State of Maine, dated June 26, 1903, of said Company's "Certificate of Organization," dated June 25, 1903, filed in the office of said Secretary of the State of Maine, and recorded therein in Volume 44, page 369.

Complying with the provisions of said vote, the undersigned herewith hands you, for filing, in your office, the above mentioned certified copy of said Company's Certificate of Organization, the same being hereto attached; and the undersigned himself certifies that the same is a true copy, and embodies the Company's Articles of Incorporation.

In Witness Whereof, the undersigned, as Clerk of said Company, has hereto signed his name and affixed the Company's corporate seal, this twenty-fourth day of July, 1903.

[SEAL.]

CHARLES H. TOLMAN, Clerk.

STATE OF MAINE,

County of Cumberland, ss:

PORTLAND, July 24, 1903.

Then personally appeared the above named Charles H. Tolman, to me known to be the Clerk of the Omaha Electric Light and Power Company, named in the foregoing certificate by him signed, and made oath that said certificate is true. Before me,

[SEAL.]

ARDON W. COOMBS,

Notary Public.

State of Maine.

Certificate of Organization of a Corporation under the General Law.

The undersigned, officers of a corporation organized at Portland, Maine, at a meeting of the signers of the articles of agreement therefor, duly called and held at the office of Ardon W. Coombs, in the City of Portland, on Thursday, the twenty-fifth day of June, A. D. 1903, hereby certify as follows:

The name of said corporation is Omaha Electric Light and Power Company.

The purposes of said corporation are (1) To carry on business as dealers in and to acquire by purchase or otherwise and hold, own, deal in, manage, pledge, sell and dispose of shares of the capital stock of other corporations, bonds mortgages and other securities, including choses in action, contracts and interests in contracts.

(2) To carry on in any manner not inconsistent with the laws of Maine the business of furnishing and selling light, heat and power produced by electricity gas or other means.

(3) To construct, equip, license, operate, buy and sell electric and other plants for furnishing illumination, heat or power generated by electricity gas or other methods and to produce and furnish such light, heat and power to individuals, firms, corporations and municipalities requiring the same.

(4) To acquire, use, sell, lease, deal in, mortgage, pledge and dispose of all such property, real, personal or mixed, including letters patent, interests therein or licenses thereunder as may advantageously be owned, operated, managed, controlled or dealt in by this corporation in connection with the prosecution of the foregoing business or any branch thereof or in connection with the development of the business of other corporations in which it shall be interested. In furtherance and not in limitation of the foregoing purposes, the corporation may make, issue and negotiate its own bonds, debentures and other evidences of indebtedness, to

59 any amount and on such terms as to security or otherwise as the directors shall approve or authorize; and all or any of the property or assets of the corporation may be mortgaged or pledged to secure payment of such bonds or debentures and the interest thereon.

Provided, however, that nothing herein before contained shall be

construed to authorize said corporation to make, generate, sell, distribute or supply gas or electricity within the State of Maine for any purpose or in any manner that would conflict with the laws thereof; and so far as the business from time to time transacted by said corporation shall be such as is ordinarily conducted by a gas or electrical company the same shall be carried on only in other states and jurisdictions and when and where permissible under the laws thereof.

The amount of preferred stock is One million dollars.

The amount of capital stock already paid is Five hundred dollars.

The par value of the shares is One hundred dollars.

The amount of capital stock is Three million five hundred thousand dollars.

The amount of common stock is Two million five hundred thousand dollars.

The names and residences of the owners of said shares are as follows:

Names.	Residences.	No. of Shares.	
		Common.	Preferred.
Ernest L. Carr.....	Melrose, Mass.....	1	
William H. Whitney.....	Boston, Mass.....	1	
Henry F. Knight.....	Boston, Mass.....	1	
Ardon W. Coombs.....	Portland, Me.....	1	
Charles H. Tolman.....	Portland, Me.....	1	
Treasury stock unissued.....		24,495	10,000
Total.....		25,000	10,000

Said corporation is located at Portland in the County of Cumberland. The number of directors is fixed by the by-laws at not less than three nor more than nine, the number for each year to be fixed by vote at the meeting when elected; the number for the first year has been fixed at five and their names are Ernest L. Carr, William H. Whitney, Henry F. Knight, Ardon W. Coombs and Charles H. Tolman.

The name of the clerk is Charles H. Tolman and his residence is Portland, Maine.

The undersigned Ernest L. Carr is president; the undersigned, Charles H. Tolman is treasurer; and the undersigned, Ernest L. Carr, Ardon W. Coombs and Charles H. Tolman are a majority of the directors of said corporation.

Witness our hands this twenty-fifth day of June, A. D. 1903.

ERNEST L. CARR, *President.*
 CHARLES H. TOLMAN, *Treasurer.*
 ERNEST L. CARR,
 ARDON W. COOMBS,
 CHARLES H. TOLMAN, *Directors.*

CUMBERLAND, ss:

JUNE 25, A. D. 1903.

Then personally appeared Ernest L. Carr, Ardon W. Coombs and Charles H. Tolman and severally made oath to the foregoing certificate, that the same is true.

Before me,

ALBERT E. NEAL,
Justice of the Peace.

State of Maine.

ATTORNEY GENERAL'S OFFICE, June 25, A. D. 1903.

I hereby certify that I have examined the foregoing certificate, and the same is properly drawn and signed, and is conformable to the constitution and laws of the State.

GEO. M. SEIDERS,
Attorney General.

State of Maine.

OFFICE OF SECRETARY OF STATE.

I hereby certify that the foregoing is a true copy from the records of this office.

In Testimony Whereof, I have caused the seal of the State to be hereunto affixed.

Given under my hand at Augusta, this 26th day of June in the year of our Lord one thousand nine hundred and three and in the one hundred and twenty-seventh year of the Independence of the United States of America.

[SEAL.]

BYRON BOYD,
Secretary of State.

Endorsed on back as follows:

Copy. (Name of Corporation), Omaha Electric Light and Power Company. Cumberland, ss. Register of Deeds. Received 61 June 25, 1903, at 3 h. 5 m. P. M. Recorded in Vol. 26, Page 254. Attest: Ray P. Eaton, Register, by Annie A. Cram, Register Clerk. A true copy of record. Attest: Ray P. Eaton, Register, by Annie H. Cram, Register's Clerk.

State of Maine.

OFFICE OF SECRETARY OF STATE.

AUGUSTA, June 26, 1903.

Received and filed this day.

Attest:

A. I. BROWN,
Deputy Secretary of State.

Recorded in Vol. 44, Page 369.

EXHIBIT "J."

"J."

DEPARTMENT OF STATE,
LINCOLN, NEBRASKA, July 30, 1903.

Edgar W. Morsman, Att'y, Omaha, Nebr.

DEAR SIR: In reply to your favors of recent date relative to the filing of articles of incorporations of the Omaha Electric Light and Power Company, we would say that we have been delaying the answering of your communications awaiting an opinion of the Attorney General.

We would say that in their present form we must refuse to file these articles, and return them herewith to you.

Under the resolution of the Board of Directors of such company they desire to transact business in this state as a "foreign corporation." We can only recognize two forms of "domestic corporations." The first, ones which are formed originally in this state. The second those formed under the laws of other states and which become domestic operations of this state, by filing their articles in this office and adopting a resolution accepting the provisions of the laws of this state. (See Sec. 215, Chapter 16, Compiled Statutes of Nebraska.) Under the opinion of the Attorney General it is a condition precedent to the filing of such articles that the Board of Directors adopt a resolution accepting the provisions of the laws of this state governing corporations. We enclose you herewith blank forms of such resolution.

We would further say that the Attorney General has under
62 advisement the question as to the necessity of such corporations establishing a principal place of business in this state and filing their articles with the county clerk and publish notice of incorporation as is required of domestic corporations.

Our fees for filing and recording articles are as follows: filing ten dollars for all corporations having a capital stock of \$100,000.00 or less and for each thousand dollars of capital stock in excess of \$100,000.00, ten cents; recording, ten cents for each 100 words contained in the articles, resolutions, etc.

Yours truly,

GEO. W. MARSH,
Secretary of State,
By FRED W. MILLER, *Deputy.*

EXHIBIT "K."

"K."

OMAHA, NEBR., Aug. 3, 1903.

Hon. George W. Marsh, Sec'y of State, Lincoln, Nebr.

DEAR SIR: Herewith I hand you copy of the Articles of Incorporation and a resolution of the Board of Directors of Omaha Elec-

tric Light & Power Company and request that they be filed and recorded in your office. I will remit you the fees for the same on notice of the amount.

Some days ago, and during my absence, Mr. E. M. Morseman, Jr., sent you these copies with a like request, and you returned them to him in your letter of July 30th, declining to file and record the same under the advice of the Attorney General, that (as I understand) it is necessary under Sec. 215, Chap. 16, Compiled Statutes of Nebraska, that the company by its Board of Directors adopt a resolution "accepting the provisions of the laws of this state governing corporations" and that your office can only recognize two forms of "domestic corporations," etc.

It is not the purpose of the company to become a domestic corporation under the provisions of Chap. 42, Acts, of 1889, which is compiled as Sec. 215, of Chap. 16, Compiled Statutes, and I do not think that chapter is in any way applicable to a foreign corporation merely proposing to do business in Nebraska, not desiring to acquire all of the rights and powers of domestic corporations.

The act of 1889 is entitled "An Act to enable foreign corporations to become domestic corporations of this state," and all of its provisions are permissive merely. It has, I think, been understood as merely providing the means by which foreign corporations may become corporations of this state and thereby acquire the right to exercise some powers which are denied to foreign corporations. For example, the power to take real property by condemnation and the power to take and hold real estate not in cities and towns, etc., and the act does not require such foreign corporations to accept the provisions of the "laws of this state governing corporations," as your letter seems to import, but merely the provisions of the particular act.

But Sec. 126, Chap. 16, Compiled Statutes of 1901, as amended in 1897, although it is quite obscure in terms, seems to be open to the possible construction that foreign corporations, before doing business in the state, shall file their Articles of Incorporation and have them recorded in your office. This section is compiled from Chap. 18, Acts of 1897, and is a substitute for Sections 126 and 127 of the Compiled Statutes of 1895, the latter of which repealed sections requiring corporations organized to construct works of "internal improvement" to file their Articles of Association and have them recorded in your office and this requirement was applicable (apparently) to foreign as well as domestic corporations organized for the construction of works of internal improvement. The repeal of these sections (126 and 127) and the reenactment of Sec. 126 as a substitute, with the specific provision concerning the use of the words "domestic corporations", seem to make possible the contention that foreign corporations are required to file their Articles and have them recorded in your office and it is under this section and out of abundant caution that I tender these papers for record.

The filing and recording in your office can do no harm at any rate as it will neither enlarge or diminish the rights of the corporation or any other person—these must all be determined regard-

less of the action of your office. I therefore trust that you will reconsider your refusal and file and record these papers advising me first of the amount required to be remitted for fees.

Yours truly,
(Sgd.)

W. W. MORSMAN.

EXHIBIT "L".

"L".

DEPARTMENT OF STATE,
LINCOLN, NEBRASKA, Aug. 6, 1903.

W. W. & E. M. Morsman, Att'ys, Omaha, Nebraska.

64 GENTLEMEN: In reply to your favors of recent date we would say that we must decline to file the articles of incorporation of Omaha Electric Light and Power Company, a corporation organized under the laws of the State of Maine. We return such articles enclosed herein.

The provisions of such articles are in controvention of and do not conform to the provisions of the laws of this state, and there is no resolution of the board of directors of such corporation accepting the provisions of the laws of this state.

In case such resolution should be adopted our fees are as follows: filing, \$250.00; recording ten cents for each 100 words contained in the articles and resolutions.

We would further say in this connection that the Attorney General has under advisement the question as to whether or not foreign corporations becoming domestic corporations are required to establish a principal place of business in this state and file their articles in the county Clerk's office and publish notice of incorporation as required of domestic corporations. He informs us that his opinion will probably be to the effect that such acts are required. Of course, we understand that under your view of the matter this does not enter into the question. You desire to file as a foreign corporation, we can find no provisions of the laws of this state applicable to foreign corporations as "foreign corporations."

Yours truly,

GEO. W. MARSH,
Secretary of State,
By FRED W. MILLER, *Deputy.*

Endorsed: Filed Aug. 31, 1908, Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit:—On the 31st day of August, 1908, Copy of Ordinance No. 826 was filed in said case, which said Copy of Ordinance No. 826 is in words and figures following to-wit:

Ordinance No. 826.

An ordinance granting right of way to the Omaha New Thomson & Houston Electric Light Co., and regulating the same, and prescribing penalties for the violation of this ordinance.

Be it Ordained by the Mayor and Council of the City of Omaha, Nebraska:

65 SECTION ONE. That the Omaha New Thomson & Houston Electric Light Company or assigns, is hereby granted right of way for erection and maintenance of poles and wires with all the appurtenances thereto, for the purpose of transacting a general Electric Light business, through, upon and over the streets, alleys and public grounds of the City of Omaha, Neb., under such reasonable regulations as may be provided by ordinance.

Provided that said Company shall at all times when so requested by City authorities permit their poles and fixtures, to be used for the purpose of placing and maintaining thereon any wires which may be necessary for the use of the Police or Fire Department of the City, and further provided, such poles and wires shall be erected so as not to interfere with ordinary travel through such streets and alleys, and provided, whenever it shall be necessary for any person to move along or across any of said streets or alleys any vehicle or structure of such height or size as to interfere with any poles or wires so erected, the company using and operating such poles and wires shall upon receiving twelve (12) hours' notice, thereof, temporarily remove such poles and wires from such place as must necessarily be crossed by such vehicle or structure. And provided further that whenever the City Council shall by ordinance declare the necessity of removing from the public streets or alleys of the City of Omaha, the telegraph, telephone or electric poles, or wires thereon constructed or existing, said Company, shall within sixty days from the passage of such ordinance, remove all poles and wires, from said streets and alleys by it constructed, used or operated.

SECTION TWO. Any person who shall interfere, cut, injure, remove, break, or destroy any of the poles, wires, fixtures, instruments or other property of The Omaha New Thomson & Houston Electric Light Company, or association within the corporate limits of this City, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum, not exceeding One Hundred Dollars (\$100.00).

66 SECTION THREE. This ordinance shall take effect and be in force from and after its passage and approval.

Passed December 16th, 1884.

[SEAL.]

J. J. L. C. JEWETT,
City Clerk.

P. F. MURPHY,
President City Council.

P. F. MURPHY,
Acting Mayor.

Approved December 17th, 1884.

I hereby certify that the foregoing is a true and correct copy of the original document now on file in the City Clerk's office.

[SEAL.]

DAN B. BUTLER,
City Clerk,
By F. H. DAILEY, *Dep.*

Fee, 75c., paid by W. W. Morsman.

Endorsed: Filed Aug. 31, 1908, Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit:—On the 31st day of August, 1908, Copy of Ordinance No. 4569 was filed in said case, which said copy of Ordinance No. 4569 is in words and figures following, to-wit:

Ordinance No. 4569.

An ordinance amending an ordinance numbered 826 entitled: "An ordinance granting the right of way to the Omaha New Thomson & Houston Electric Light Company and regulating the same and prescribing penalties for the violation of this ordinance."

Whereas, Ordinance No. 826, entitled: "An Ordinance granting the right of way to the Omaha New Thomson & Houston Electric Light Company and regulating the same and prescribing penalties for the violation of this ordinance", passed December 16th, A. D. 1884, granting certain privileges and franchises therein defined and regulating the exercise of the same and prescribing penalties for the violation of said ordinance by mistake named the "Omaha New Thomson & Houston Electric Light Company", as grantee, and

Whereas, the intention was to name the "New Omaha Thomson-Houston Electric Light Company" as such grantee, which is the true name of the corporation to which said privileges and franchises were granted.

67 Be it ordained by the City Council of the City of Omaha:

SECTION 1. That Ordinance No. 826, entitled: "An ordinance granting the right of way to the Omaha New Thomson & Houston Electric Light Company and regulating the same and prescribing the penalties for the violation of this ordinance" be and the same hereby is amended to read as follows, to-wit:

Ordinance No. 826.

An ordinance granting the right of way to the New Omaha Thomson-Houston Electric Light Company and regulating the same and prescribing penalties for the violation of this ordinance.

Be it ordained by the City Council of the City of Omaha:

SECTION 1. That the New Omaha Thomson-Houston Electric Light Company, or assigns, is hereby granted right of way for erection and maintenance of poles and wires, with all the appurtenances

thereto, for the purpose of transacting a general electric light business, through, upon and over the streets, alleys and public grounds of the City of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance, Provided that said Company shall at all times, when so requested by the City authorities, permit their poles and fixtures to be used for the purpose of placing and maintaining thereon any wires that may be necessary for the use of the Fire Department or police of the City, and Provided Further, such poles and wires shall be erected so as not to interfere with ordinary travel through such streets and alleys, and Provided, that whenever it shall be necessary for any person to move along or across any of said streets or alleys any vehicle or structure of such height or size as to interfere with any poles or wires so erected,—the Company using and operating such poles or wires shall, upon receiving twelve (12) hours' notice thereof, temporarily remove such poles and wires from such place as must necessarily be crossed by such vehicles or structure; and Provided Further, that whenever the City Council, shall by ordinance, declare the necessity of removing from the public streets or alleys of the City of Omaha, the telegraph, telephone or electric poles or wires thereon constructed or existing, said Company shall within sixty (60) days from the passage of such ordinance remove all poles and wires from said streets and alleys by it constructed, used or operated.

SECTION 2. Any person who shall interfere, cut, injure, remove, break or destroy, any of the poles, wires, fixtures, instruments
68 or other property of the New Omaha Thomson-Houston Electric Light Company, or association, within the corporate limits of this City shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding One Hundred Dollars.

SECTION 3. This ordinance shall take effect and be in force from and after its passage.

SECTION 2. This ordinance amending ordinance No. 826 shall take effect and be in force from and after its passage.

Passed April 25th, 1899.

BEECHER HIGBY,
City Clerk.
W. W. BINGHAM,
President City Council.

Approved May 1st, 1899.

FRANK E. MOORES, *Mayor."*

I hereby certify that the foregoing is a true and correct copy of the original document now on file in the City Clerk's office.

[SEAL.]

DAN B. BUTLER,
City Clerk,
By F. H. DAILEY, *Dep.*

Fee, 80c., paid by W. W. Morsman.

Endorsed: Filed Aug. 31, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 31st day of August, 1908, Copy of City Ordinance, No. 3391 was filed in said case, which said Copy is in words and figures following, to-wit:

Ordinance No. 3391.

An ordinance defining the duties of the city electrician and establishing rules and regulations concerning electric work, wires, and poles, and providing penalties for the violation of the provisions thereof.

Be it ordained by the City Council of the City of Omaha:

Section I.

That upon application, it shall be the duty of the City Electrician on receipt of a notice of the completion of the wiring of any building, to at once inspect the work, and if the same is approved by him to issue a certificate of inspection, which will contain date of inspection and a general description of the result of such examination; but no such certificate shall be made or issued unless the electric
69 light or power plant and all apparatus, wiring, etc., connected with it shall be in strict conformity with the rules and regulations hereinafter set forth.

Section II.

That the City Electrician shall inspect all isolated electric light plants now in operation in the city, or hereinafter installed, at least twice in each year, or oftener if application is made by the owners of such plants, and shall see that any dangerous faults are removed at once.

It shall be the duty of the City Electrician to see that all sidewalks or pavements cut open for the erection of poles shall be restored substantially in as good condition in every respect as they were before such erection.

Section III.

That the City Electrician shall cause all wires, (except telephone) that have not been in use for thirty days, and which are known as "dead wires," to be removed at once, at the expense of the owner, and during said period said wires shall be kept in as safe a condition as the wires in use; and all dead wires of telephone companies shall be detached from the residences in which same have been used and grounded at the pole nearest said residence.

Section IV.

That the City Electrician shall condemn and notify the owner to renew old wires with new where such wire has become defective by reason of reduced size and tensile strength, the intent and purpose being to reduce the number of broken wires hanging down in the street, endangering and impeding travel after heavy storms of wind and sleet.

Section V.

That the City Electrician, or inspector authorized by the City Electrician, shall have the right at any time to enter any building, man-hole or subway for the purpose of making any tests on the electrical apparatus therein contained. For this purpose he shall be given prompt access to all manholes—public or private—on application to the company or individual owning same.

Section VI.

That the said City Electrician shall make a thorough inspection of the lines of all companies owning wires in the city, at least twice a year, and where wires are in a dangerous condition, shall
70 notify the companies owning the same to replace them in a safe and secure manner. Any company refusing or neglecting to remove or change such dangerous wires, after due notice from the City Electrician, shall be subject to a penalty of five dollars (\$5.) per day until the wires are removed or placed in a safe condition.

Section VII.

That the said City Electrician shall have the power to cause the removal of all electrical wires or the turning off of dangerous circuits where the same interfere with the Fire Department. He shall, by virtue of his office, together with any authorized deputies, be clothed with the powers of regular policemen while in the discharge of his duties.

Section VIII.

That all fees named herein shall be paid to the City Treasurer, and a duplicate receipt therefor shall be presented to the City Electrician for filing before any permit under this ordinance shall be issued.

Section IX.

That a fee of one dollar (\$1.) per hour for all semi-annual inspection of wires of each class and distinct ownership outside of buildings shall be charged and paid to the City Treasurer, provided that no such fee shall exceed the sum of fifty dollars (\$50.) for such inspection.

Section X.

That for each and every permit issued, a fee of one dollar (\$1) shall be paid to the City Treasurer, and an additional fee of twenty-five cents (25c.) for each pole set under such permit.

Section XI.

That the City Electrician shall keep a complete record of all official work done and fees charged, and make an annual report thereof to the Mayor and City Council, together with any recommendations he may deem best.

Section XII.

That the City Electrician shall, as soon as practicable and annually thereafter, prepare a map of the city showing in detail the occupation of the streets and alleys by the poles, wires and conduits of the different companies, and also the lines and wires of the city, and shall correct the same from time to time as new extensions are made.

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Section XIII.

The following rules and regulations for the use of electric wires and appliances in the City of Omaha, are hereby adopted:

Rules.

Wires or conductors of the first class referred to in these rules, are those used for transmitting telegraphic or telephonic messages or service of like nature.

Wires or conductors of the second class are those used to convey heavy currents, or currents of high potential, or both. Those used for electric lighting or transmission of power belong to this class.

No. 1.—Permits for Lighting and Power in Buildings.

No electric system shall be used for lighting any building or portion thereof, or to furnish power, unless a permit shall be first procured from the City Electrician to run wires to accommodate such system. The City Electrician shall issue such permits on application, and shall make a charge of one dollar (\$1.) for each permit, and at the rate of one dollar (\$1.) per hour actual time devoted to each inspection necessarily made. Such inspection to be made semi-annually, and oftener when requested by occupants or owners.

No. 2.—Placing and Removing of Poles.

No poles or line of poles for any electric use shall be permitted upon the public streets until after an application for permit shall have been filed with the City Electrician. Such application to be accompanied with a full and complete plan of poles, arms, etc. to be erected.

No. 3.—Crossing of Pole Circuits.

Where wires of two classes cross each other, special care is needed.

The uppermost wires must cross the others by as short a span as possible, and special care must be taken to place them strongly so that there is no danger of their falling on those below. Where possible, a pole is to be placed at their point of crossing, the conductors of the second class being above except where wires of the first class are to be used from distributing poles in connection with wires from underground conduits. Where the pole is of metal, securely

grounded, no danger will result from the proximity of the wires, but where it is of wood, special precaution must be taken to wrap the upper part of the pole and cross arms with wire of large size securely grounded by attachment to the nearest gas or water pipe or a plate buried in moist earth by a conductor equivalent in resistance to a section of iron of one-tenth of a square inch, so that any leaking current may be immediately carried to the ground.

No. 4.—Arrangement of Poles.

Poles carrying the two classes of wires shall not occupy the same side of the street, neither shall they cross each other except by the method given in Regulation No. 3 above.

When wooden poles are to be used, they shall be protected by wire or iron bands on the lower six feet, and shall be neatly painted with at least two coats of paint.

To avoid any unnecessary excess of poles where it may be deemed practicable the City Electrician may require the placing of wires of different companies of same class upon the same poles. The basis of rental of such poles to be determined by arbitration, each party to name one arbitrator, and these to choose a third, such determination to be made known to the City Electrician and recorded in his office.

No. 5.—Placing of New Poles or Attachments.

Application for the placing of new poles or adding any new arms to the poles already in place, public or private, is to be made to the City Electrician, in writing on a suitable printed form and permission is only to be granted in situations where the service cannot be done by underground wire in conduits. The City Electrician is to be the judge of such possibility.

No. 6.—Repairing Streets and Sidewalks.

All earth or other rubbish taken out of the walks or streets for the erection of poles shall be promptly carted away. Failing or neglecting to restore streets and walks and haul away the excavated material in a reasonable time, the City Electrician shall have the right to cause such work to be done at the expense of such parties, and no further permits of any kind shall be issued to such parties until such expense shall have been made good to the City.

No. 7.—Metal Poles to Be Grounded.

Every metal pole or structure having conductors attached to it by insulators and carrying currents above 300 volts in potential must be securely grounded, so that the ground resistance is less than 10 ohms at all times and states of the weather.

No. 8.—Circuits Are to Be Branded.

All cables and wires to be conspicuously branded by the company owning them at every manhole, as well as at each arc lamp

and at each insulator, by a suitable and conspicuous label or brand easily seen from the street in case of overhead wires, so that every electrical system can be recognized at once and responsibility for damages or violation of the law can be quickly fixed.

No. 9.—Special Precautions.

No lines of the second class of 500 volts or over shall hang within 18 feet of the pavement at their lowest point except where a lamp connection is to be made, or in case of viaducts having less headway; nor pass nearer than 10 vertical or 5 horizontal feet to any awning frame or other metallic conductor rising from the street, even for lamp connections, without special and careful insulation of the wire. Whenever there is a chance of leakage to the iron frame or post, the latter is to be securely grounded. All joints must be as well insulated as the main line.

No. 10.—Wires Must Be Properly Attached to Objects Near Them.

All wires passing within four inches of any fixed object must be attached to it by proper insulators unless supported within ten feet of it by being attached to another insulator at that point, and the wires outside or inside the building must never, even when insulated, be in contact with any object, but always be separated from it by an approved insulator.

No. 11.—No Earth Returns Allowed.

All circuits of the second class must be entirely metallic and no earth connections must be used for lines situated within the limits of the City of Omaha.

Special permission to use the earth for the return circuit can only be given to telephone and telegraph companies and to street railways using trolley systems.

No. 12.—Entrance Into and Passage of High Potential Wires Through Buildings.

Wires of the second class above 300 volts entering buildings must be at least one foot apart for each 1,000 volts potential. They must have a thickness of approved waterproof insulation of at least one-tenth of an inch for each and every 1,000 volts of potential for at least five feet before entering the building and continuing within the building to a point where the wires are so high above the floor or sufficiently distant from any danger to life or property.

The insulation may then be reduced to one-half the above thickness. The passage through all walls or partitions is to be made by the wire with thick insulation laid in incombustible insulating tubes.

No. 13.—Inside Wires.

All wires of the second class in buildings are to be covered most carefully from end to end and at the joints with durable insulating material which does not become very soft at 150 degrees F.

In all situations the insulation must be waterproof. The whole is to be covered with durable covering of tape, thread or woven material, and the thickness is to be proportioned to the potential. Bare wire inclosed in wood is not to be used, neither so-called "Underwriter's wire."

In the building the two wires must be one foot apart for 1,000 volts and in proportion for other potentials, except for constant potential systems with safety plugs when the wires can be twisted together and placed in the tubes or channels of non-inflammable material, provided the current does not exceed 10 amperes.

The insulated wires are to be supported on insulators near together and laid in boxes, wooden or non-conducting incombustible material, at least three inches square on the inside, with a glass cover to render the interior visible. The boxes are to be suitable ventilated. These boxes are to be carried to all points at a height not less than seven feet above floor line. Beyond and above that point the insulation may be of a thinner variety, and the wires suspended freely in the air tightly stretched on insulators.

No. 14.—Wires Must Be Accessible.

All wires carrying high potential currents must be placed in easily accessible positions, and it is best to have the tubes and wires clearly in view the whole length.

No. 15.—Sizes of Wires.

The wires must all be of sufficient size to carry twice the current without more than a slight heating. One thousand amperes to the square inch of copper is considered safe in most positions, especially for small wires not too closely inclosed. Two thousand amperes to the square inch is often safe for small free conductors.

No. 16.—Cut-off and Safety Fuses.

Every line of second class entering a building shall be controlled by a suitable cut-off near the entrance, in sight and easily accessible.

In the case of so-called constant potential systems and transformer systems, a suitable safety fuse or its equivalent must be used in each branch of the circuit of the entrance to the building, and at all places where a change in the size of wire occurs to cut off the current on the occurrence of a short circuit.

No fuse wire or other safety device shall have a greater carrying capacity than a ten per cent. excess of the proper ampere capacity.

No. 17.—Switches.

Switches, resistances, commutators and cut-outs, must be mounted on incombustible bases in such places as to avoid all danger of conflagration. Wood, properly treated, can be used. All attachments to the same are to be easily accessible, and in case of circuits above 300 volts their parts so arranged by the use of insulators or grounded metal screens that there is no possibility of accidental contact. In

case connections are made at the back, the same must be easily accessible and not placed against a wall or other object where a concealed fire may form.

No. 18.—Lightning Arrester.

Suitable appliances for protection against lightning shall be placed in every building in connection with every wire entering same.

No. 19.—Motors and Dynamos Carefully Placed.

Electric motors or dynamos must not be placed in position where there is escaping gas or vapor, or fumes of any inflammable substance or inflammable dust, as the sparks at the commutators may cause an explosion.

No. 20.—Currents Must Be Shut Off to Make Repairs.

Wherever deemed necessary for the protection of employes the City Electrician shall have the power to require the company making repairs or alterations to wires carrying over 500 volts to use satisfactory safety appliances.

No. 21.—Frames for Dynamos and Motors.

All metal frames of dynamos and motors, regardless of voltage, must be kept clear of any ground, and must be so placed that no one can place their hands on exposed parts carrying electric current and make an electrical connection with gas, water or steam pipes with their own hand or any part of their body, and if floor is damp and cannot be made dry, some well-insulated platform must be built around same.

No. 22.—Converters Must Be Made Safe to Life and Property.

Converters must be furnished with proper safety plugs in both circuits, and no fuse plug or other safety device shall have a greater carrying capacity than ten per cent. in excess of their ampere capacity.

Converters shall not be allowed inside of buildings except in special cases, and then they must be encased in a thorough non-inflammable material which must meet the approval of the City Electrician.

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No. 23.—Arc Lamps to Be Made Safe.

All arc lamps in public positions are to be placed with their lower part at least eight feet above the pavement or floor and all connections are to be placed out of reach of accidental contact. All parts of arc lamps in the circuit and liable to be handled shall be insulated or protected by a grounded metal frame.

The arc lights are always to be enclosed in glass globes, and surrounded with wire netting where necessary.

No. 24.—Wires of First Class.

Wires of the first class are perfectly harmless by themselves and can be placed in buildings in any manner, the only care needed to place a proper lightning arrester when they are connected with an overhead system, and to remove them from all danger of contact with wires of the second class. Where there is danger of the latter, some protective device to prevent heavy currents entering should be adopted.

No. 25.—Public Conduits.

The city having the use of one duct in the telephone conduits, the placing of all wires belonging to the city within said conduit, and their maintenance and repairs shall be under the direction of the City Electrician. He shall have the right to enter any manhole in the conduits laid on the public streets at all times and be furnished with prompt access to the same by the telephone company.

No. 26.—Wires Must Be Put Underground, Except, etc.

No permits to place wires overhead shall be given by the City Electrician unless the same or equivalent service cannot be rendered by wires in conduits, or the company applying for the permit owns no conduits of its own at the given place.

In such case the system of distribution across house-tops is to be encouraged both for the first and second class of conductors.

No. 27.—Insulation and Voltage.

No limit to the voltage or quantity of current is to be made when the same is properly regulated and controlled to prevent danger to life or property, and is constantly tested in accordance with these rules and regulations.

No. 28.—Dangerous Wires to Be Painted Red or Otherwise Designated.

Wires carrying currents at a potential of 500 volts or higher, excepting trolley wires, are to be painted a bright red or by other distinct designation, by the persons or company owning them, 77 wherever visible, as a signal of danger, and the lead covering of such cables in public manholes are also to be painted or by other distinct designation. The outside of grounded metal tubes carrying wires inside of buildings need not be so painted inside the building, but the outside insulation of the wire must be so painted, or otherwise distinctly designated.

No. 29.—High Potential Wires to Be Insulated.

Overhead wires of Class 2 are to be continuously insulated with durable and waterproof material to be approved by the City Electrician. This insulation is to be carried to all portions of the cir-

cuit, including joints, and is to be kept in constant repair. So-called "Underwriter's wire" is not to be considered satisfactory. This does not include trolley wires.

No. 30.—Insulation Resistance.

The wiring in any building must test free from "grounds" and show an insulation resistance for each volt of pressure used of over ten thousand (10,000) ohms per mile of wire.

The City Electrician shall have the power to order ground detectors, continuous or otherwise, to be located at any portion of the circuit he may think desirable.

The insulation must be approved by the City Electrician and for overhead wires be at least two megohms per mile per 100 volts.

For underground cables in private conduits no tests of the cables by themselves need be made, but only after all the connections are made as above.

No. 31.—Companies Must Provide Themselves with Testing Apparatus.

Every electric light or power company doing business in the city shall provide itself with such instruments for electrical testing as are considered necessary by the City Electrician, and they shall be located at such places and shall have such connections as the City Electrician shall consider necessary for the protection of life and property, and the carrying out of these rules and regulations.

No. 32.—No Great Leakage from Circuits Allowed.

The insulation of all circuits of the second class is to be maintained as follows:

If any circuit, overhead or underground, in private or public conduits, with all attachments or connections, and with full current flowing, is grounded at any point, the current escaping must be not to exceed one-twentieth of an ampere. The City Electrician shall

78 have power to make this test or order it made on any circuit at any time; such tests shall not be made when they will interfere with the service to consumers except where unavoidable; and he has also power to remove the insulation from any wire at any time to make the proper connection, notice being given to the company after the test to close the opening at their own expense.

No. 33.—Street Railways.

On street railways all circuits where the rails are used for return circuits shall be provided with an improved automatic circuit breaker fuse, or other device that will immediately cut off the circuit in case the trolley wires shall become short circuited; said circuit breaker shall be placed in power station, in full view of the attendant, and must be mounted on a fire proof base. All trolley wires shall be well insulated from their supports. All trolley wires shall have a guard wire running above same their entire length, except where

there is no danger from other wires falling on them. In no case shall the guard and trolley wires be closer than one foot apart. All platforms, brake-handles, rheostats accessible to passengers and employés, must be free from all electrical connections with trolley wires.

No. 34.—Pipes.

No plumber, gas fitter, or other metal worker, shall be allowed to run water pipes, gas pipes, or tin tubes, within six inches of any electric wire of the second class without notifying the City Electrician and securing his approval of the same; and when any plumber or gas fitter causes any loss or damage to any wires by not complying with this Section he or they shall be responsible for all loss or damage, and when the Plumbing Inspector has been notified by the City Electrician that a gas fitter or plumber has not complied with this Section, no more permits shall be issued to said plumber or gas fitter until such damage shall have been paid.

No. 35.—Maintenance of Wires.

All electrical work shall be done, and all electric wires shall be placed and maintained as required by the City Electrician in accordance with these rules and regulations.

No. 36.—Appliances Must Be Inspected.

All wires, cables, insulators, switches, lightning arresters, and safety plugs, shall only be used when accompanied by a permit from the City Electrician certifying that they are safe and according to regulation; and every police officer, authorized inspector or other person authorized by the City Electrician, may demand the production of a permit from the Company owning such devices within twenty-four hours, or immediately from the lineman or other workmen while he is placing them in position or making any repairs to them.

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No. 37.—Ground Detectors to Be Used.

All circuits to be furnished with a suitable ground detector, and to be tested at regular intervals. If a ground is detected it must be removed at the earliest possible time. In case it is continued beyond that time the company owning and operating the lines shall be responsible for all damage which may occur.

No. 38.—Linemen Must Wear Badges.

All linemen of the different companies while on duty must wear a conspicuously numbered badge, indicating the name of the company by whom he is employed. To do any work in the putting up or repairing of poles, wires, or other electrical appliances in the public streets, he must have a permit from the City Electrician, to be produced at any time when demanded by any member of the police force, or other persons designated by the City Electrician. If dealing

with wires of the second class, he must be furnished with rubber gloves and properly insulated appliances, and use the same when necessary.

No. 39.—Repairs Must Be Made.

Each company or individual using electrical appliances in the city is to keep its appliances in perfect repair and up to the requirements of these rules and regulations.

The City Electrician shall have the right to require any repairs, alterations, or changes, in the electrical appliances of any company, corporation or individual, to bring the same within the rules and regulations of the city; and if after such repairs or changes shall have been ordered by the City Electrician and reasonable notice served on said company, corporation or individual to make such repairs or alterations, they be not complied with, the City Electrician shall have power, at his discretion, to make such repairs or alterations, and charge the cost of the same to said company, corporation or individual.

No. 40.—Companies Must Report.

Every company, corporation, firm or individual doing electrical work in the city of Omaha, or owning any wires or cables in the public highway, shall, on or before January 1st, each year, officially certify to the City Electrician, the number and locality of wires, electrical conductors, conduits, cables or tubes, and the miles of wire laid under ground or on poles within the city of Omaha. They shall also specify the number and location of incandescent or arc lamps on their circuits, the number, location and power of motors they are running by the aid of their circuits and their location, together with the electric-motive force and intensity of currents in each locality and through each circuit.

No. 41.—Companies Must Report Changes.

All electrical companies doing business in the city must file once a week at the office of the City Electrician, a report, on the proper printed blank, as to any new constructions carried on during the week, and it shall be the duty of the Electrician on the receipt of such reports, to detail an inspector to report on the same and see that all the regulations are carried out.

A daily test of a total insulation of the circuit with all attachments is to be made by the owner of the circuit of the second class, and together with the working of the ground detector, the records of which shall be accessible at all times to the City Electrician.

The insulation of the whole circuit, with all its connections, including dynamos and motors, shall never be less than 100 ohms for each volt or potential.

No. 42.

All companies, firms, or individuals, except such as wire for motors, doing wiring for the second class shall procure a license from the City Electrician and shall deposit fifty dollars (\$50.) with the

City Treasurer during the term of said license, and also give a bond to the city of Omaha in the sum of twenty-five hundred dollars (\$2,500.) said bond to be approved by the Mayor and City Council. This is to insure the faithful performance of this ordinance, and any company, firm or individual shall be liable for any damage or loss that may occur from any neglect or carelessness while employed in wiring, or from poor work or material, and the City Electrician shall revoke his license.

By returning the receipt and license to the City Treasurer, with an order from the City Electrician, the deposit shall be returned.

Section XIV.

Any person, company or corporation, who shall violate any of the provisions of the foregoing sections, or who shall violate, refuse or neglect to comply, with the rules and regulations in this ordinance, or who shall refuse or neglect to comply with any order or demand of the City Electrician made in pursuance of and by the authority of any of the provisions of this ordinance, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding two hundred dollars, (\$200.) or be imprisoned not exceeding thirty days, or both fined and imprisoned, in the discretion of the Court.

81

Section XV.

That this ordinance shall take effect and be in force from and after its passage.

Passed December 20th, 1892.

[SEAL.]

JOHN GROVES,

City Clerk.

E. P. DAVIS,

President City Council.

Approved December 24th, 1892.

GEO. P. BEMIS, *Mayor.*

I hereby certify that the foregoing is a true and correct copy of the original document now on file in the City Clerk's office.

[SEAL.]

DAN B. BUTLER,

City Clerk,

By F. H. DAILEY, *Dep.*

Fee \$3.30 Paid by W. W. Morsman.

Endorsed: Filed Aug. 31, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 31st day of August, 1908, Certified copy of City Ordinance No. 3791 was filed in said cause, which said Certified Copy is in words and figures following, to-wit:

Ordinance No. 3791.

An ordinance defining the duties of the city electrician and establishing rules and regulations concerning electric work, wires and poles, and providing penalties for the violation of the provisions of said ordinance and rules established thereunder and by virtue thereof; also to repeal Ordinance No. 3391.

Be it ordained by the City Council of the city of Omaha:

SECTION 1. That upon application it shall be the duty of the City Electrician or other person in charge of said department, on receipt of a notice of the completion of the wiring of any building, to at once inspect the work, and if approved by him, to issue a certificate of inspection which shall contain the date of the inspection and a general description of the result of such examination; but no such certificate shall be made or issued unless the electric light or power plant and all apparatus, wiring, etc., connected with it shall be in strict conformity with the rules and regulations hereinafter set forth.

82 SECTION 2. That the City Electrician or other person in charge of said department shall inspect all isolated electric light plants now in operation in the City, or hereafter installed, at least twice in each year or oftener if application is made by the owners of such plants, and he shall see that any dangerous or defective machinery, wires or appliances are removed or remedied at once.

SECTION 3. That the City Electrician or other person in charge of said department shall cause all wires (except telephone wires) that have not been used for thirty days and which are known as "dead wires" to be removed at once at the expense of the owners, and during said period when said wires are not used they shall be kept in as safe a condition as the wires in use; All dead wires of telephone companies shall be detached from the residences and buildings in which same have been used and they shall be grounded at the pole nearest said residence or building.

SECTION 4. The City Electrician or other person in charge of said department shall condemn and notify the owners to renew old wires with new where such wire or wires has become defective by reason of reduced size and tensile strength.

SECTION 5. The City Electrician or duly authorized inspector or other person in charge of said department shall have the right at any time to enter any building, manhole or subway in the discharge of his or their official duties or for the purpose of making any tests of the electrical apparatus or appliances therein contained. And for this purpose he or they shall be given prompt access to all buildings, public or private, and all manholes and conduits on application to the company or individual owning or in charge or control of the same.

SECTION 6. The said City Electrician or other person in charge of said department shall make a thorough inspection of the lines of all companies owning wires in the city at least twice in each year, and where wires are in a dangerous condition, shall notify the companies owning, using or operating them to place the same in a safe

and secure condition within forty-eight (48) hours. Any company failing or refusing to repair, change or remove the same within forty-eight (48) hours after the receipt of such notice shall be subject to a penalty of Five dollars (\$5) for each and every day until such wires are repaired, changed or removed as directed by such officer or person in charge of said department.

SECTION 7. That the said City Electrician, inspector or other person in charge of such department shall have the power to
83 cause the removal of all electrical wires or the turning off of dangerous circuits where the same interfere with the work of the Fire Department.

SECTION 8. That all fees herein required shall be paid to the City Treasurer, who shall receipt for same in duplicate, one of which receipts shall be filed in the office of the City Electrician before any permit required by this ordinance or its rules shall be issued.

SECTION 9. That a fee of one dollar for each hour actually engaged in making the semi-annual inspection of plants, buildings and wires of each class and distinct ownership shall be charged and paid to the City Treasurer upon the certificate of the City Electrician or person in charge of said department, provided that in no event shall the charge or fee exceed the sum of Fifty dollars (\$50.00) for any one owner, partnership, corporation or plant.

SECTION 10. That for each and every permit issued a fee of one dollar (\$1) shall be paid to the City Treasurer and an additional sum or fee of twenty-five cents (25c) shall be charged for each pole set under said permit.

SECTION 11. That the City Electrician or other person in charge of said department shall keep or cause to be kept a full and complete daily record of all work done, permits issued, examinations made, or other official work performed as required by the provisions of this ordinance or its rules, and make a full and detailed report thereof to the mayor and council on or before the first Tuesday of January of each year.

SECTION 12. That the City Electrician or other person in charge of said office shall at once prepare a map of the City showing in detail the occupation of the streets and alleys by the poles, wires and conduits of the different companies, corporations or individuals, including the city of Omaha, and said map shall be corrected from time to time as extensions or changes may be made under permits granted therefor.

SECTION 13. The following rules and regulations for the use of electric wires, plants and appliances are hereby adopted and approved, viz:

Rules and Requirements of the City of Omaha, Neb., for the Installation of Wiring and Apparatus for Electric Light and Power.

Class "A. A."

Concealed work must be examined and preliminary certificate obtained before being covered.

The use of wire ways for rendering concealed wiring permanently

- 84 accessible is most heartily endorsed and recommended; and this method of accessible concealed construction is advised for general use.

Architects are urged, when drawing plans and specifications, to make provision for the channeling and pocketing of buildings for electric light or power wires, and in specifications for electric gas lighting to require a two-wire circuit, whether the building is to be wired for electric lighting or not, so that no part of the gas fixtures or gas piping be allowed to be used for the gas lighting circuit.

Central Stations.

Class A.

For Light or Power.

These rules also apply to Dynamo Rooms in Isolated Plants, connected with or detached from buildings used for other purposes; also to all varieties of apparatus therein, of both high and low potential.

1. Generators:—

- a. Must be located in a dry place.
- b. Must be insulated on floors or base frames, which must be kept filled to prevent absorption of moisture, and also kept clean and dry.
- c. Must never be placed in a room where any hazardous process is carried on, nor in places where they would be exposed to inflammable gases, or flyings, or combustible material.
- d. Must each be provided with a water proof covering.

2. Care and Attendance:—

A competent man must be kept on duty in the room where generators are operating.

Oily waste must be kept in *approved* metal cans, and removed daily.

3. Conductors:—

From generators, switch boards, rheostats, or other instruments and thence to outside lines, conductors—

- a. Must be in plain sight, and readily accessible.
- b. Must be wholly on non-combustible insulators, such as glass or porcelain.
- c. Must be separated from contact with floors, partitions or walls, through which they may pass, by non-combustible tubes, such as glass or porcelain.
- d. Must be kept rigidly so far apart that they cannot come in contact.

- 85 e. Must be covered with non-inflammable insulating material sufficient to prevent accidental contact, except that "bus bars" may be made of bare metal.

f. Must have ample carrying capacity, to prevent heating (See capacity of Wires' Table.)

4. Switch Boards:—

Should be approved before being placed.

a. Must be so placed as to reduce to a minimum the danger of communicating fire to adjacent combustible material.

b. Must be accessible from all sides when the connections are *the* on the back; or may be placed against a brick or stone wall when the wiring is entirely on the face.

c. Must be kept free from moisture.

d. Must be made of non-combustible material, or of hardwood in skeleton form, filled to prevent absorption of moisture.

e. Bus bars must be equipped in accordance with Rule 3 for placing conductors.

5. Resistance Boxes and Equalizers:—

a. Must be equipped with metal, or other non-combustible frames.

b. Must be placed on the switch board, or, if not thereon, at a distance of one foot from combustible material, or be separated therefrom, by a non-inflammable, non-absorptive, insulating material.

6. Lightning Arresters:—

a. Must be attached to each side of every overhead circuit connected with the station.

b. Must be mounted on non-combustible bases in plain sight on the switch board, or in an equally accessible place, away from combustible material.

c. Must be connected with at least two "earths" by separate wires, not smaller than No. 6 B. & S., which must not be connected to any pipe within the building.

d. Must be so constructed as not to maintain an arc after the discharge has passed.

7. Testing:—

a. All series and alternating circuits must be tested every twenty-four hours, to discover any leakage to earth, and a record of such tests submitted to the Electrical Inspection.

b. All multiple arc low potential systems (300 volts or less) must be provided with an indicating or detecting device, readily attachable, to afford easy means of testing where the station operates continuously.

86 c. Data obtained from all tests must be preserved for examination by inspectors.

These rules on testing to be applied at such places as may be designated by the Electrical Inspection.

Motors.

8. Motors:—

a. Must be wired under the same precautions as with a current of the same volume and potential for lighting. The motor and resistance box must be protected by a double pole cut-out and controlled by a double pole switch, except in cases where five amperes or less is used on low tension circuits, where a single pole switch will be accepted.

b. Must be thoroughly insulated, mounted on filled dry wood, be raised at least eight inches above the surrounding floor, be provided with pans to prevent oil from soaking into the floor, and must be kept clean.

c. Must be covered with a waterproof covering when not in use, and if deemed necessary by the Inspector, must be enclosed in an *approved case*.

9. Resistance Boxes:—

a. Must be equipped with metal or other non-combustible frames.

b. Must be placed on the switch board or at a distance of one foot from combustible material, or separated therefrom by a non-absorptive, insulating material.

c. Starting boxes must be so arranged that resistance can not be left in circuit.

Class B.

Arc (Series) Systems.

Over 300 Volts.

10. Outside Conductors:—

All outside, overhead conductors (including services):—

a. Must be covered with some insulating material, not easily abraded, firmly secured to properly insulated and substantially built supports, all tie wires having an insulation equal to that of the conductors they confine.

b. Must be so placed that moisture cannot form a cross connection between them, not less than one foot apart, and not in contact with any substance other than their insulating supports.

c. Must be at least seven feet above the highest point of flat roofs, and at least one foot above the ridge of pitched roofs over which they pass or to which they are attached.

87 *d.* Must be protected by *dead insulated guards irons or wires* from possibility of contact with other conducting wires or substances, to which current may leak. Special precautions of this kind must be taken where sharp angles occur or where any wires might possibly come in contact with electric light or power wires.

e. Must be provided with petticoat insulators of glass or porcelain. Porcelain knobs or cleats and rubber hooks will not be approved.

f. Must be so spliced or joined as to be both mechanically and electrically secure without solder. The joints must then be soldered, to insure preservation and covered with an insulation equal to that on the conductors.

g. Telegraph, telephone and similar wires must not be placed on the same cross-arm with electric light or power wires.

Interior Conductors.

12. All Interior Conductors:—

Must, where entering buildings, have the holes bushed with water-proof non-combustible insulating tubes, or where, from the nature of the case, this construction is impossible, with an *approved flexible tube*. The tube should slant upward toward the inside, and must be sealed with tape thoroughly painted, securing the tube to the wire.

a. Must be arranged to enter and leave the building through a double contact service switch, which will effectually close the main circuit and disconnect the interior wires when it is turned "off." The switch must be so constructed that it shall be automatic in its action, not stopping between points when started, and prevent an arc between the points under all circumstances; it must indicate on inspection whether the current be "on" or "off" and be mounted in a non-combustible case, and kept free from moisture and easy of access to police or firemen.

b. Must always be in plain sight, except that lead encased conductors may be run in moulding, in which case at least six inches of the lead covering shall project beyond the moulding.

c. Must have an *approved* insulating covering.

d. Must be supported on glass or porcelain insulators, and kept rigidly at least four and, where possible, eight inches apart, except within the structure of lamps or on hanger boards, cut-off boxes, or the like, where less distance is necessary.

e. Must be separated from contact with walls, floors, timbers or partitions through which they may pass by non-combustible insulating tube or where from the nature of the construction it is impossible to use a rigid tube, an *approved flexible tube* may be used.

f. Must be so spliced or joined as to be both mechanically and electrically secure without solder. They must then be soldered, to insure preservation, and covered with an insulation equal to that on the conductors.

Lamps and Other Devices.

13. Arc Lamps—In every case:—

a. Must be carefully isolated from inflammable material.

b. Must, unless otherwise permitted, be provided at all times with a glass globe surrounding the arc, securely fastened upon a closed base. No broken or cracked globes to be used.

c. Must be provided with an *approved* hand switch, also an automatic switch, that will shunt the current around the carbons should they fail to feed properly.

d. Must be provided with reliable stops to prevent carbons from falling out in case the clamps become loose.

e. Must be so constructed that spark arresters can be adjusted without short-circuiting the lamp.

f. Must be provided with a wire netting around the globe, and an *approved* spark arrester above to prevent escape of sparks, melted copper or carbon, where readily inflammable material is in the vicinity of the lamps. It is recommended that plain carbons, not copper plated, be used for lamps in such places.

g. The use of hanger boards is not advised. The following construction is recommended: Hanging lamps direct by insulated wires attached to waterproof non-combustible insulating supports. When used hanger boards must be so constructed that all wires and current-carrying devices thereon shall be exposed to view, and thoroughly insulated by being mounted on a waterproof, non-combustible substance. All switches attached to the same must be so constructed that they shall be automatic in their action not stopping between points when started, and preventing an arc between points under all circumstances.

14. Incandescent Lamps in Series Circuits Having a Maximum Potential of 300 Volts or Over:—

a. Must be governed by the same rules as for arc lights, and each series lamp provided with an *approved* hand-spring switch and automatic cut-out.

b. Must have each lamp suspended from a hanger board by means of a rigid tube.

c. No electric-magnetic device for switches and no system of multiple-series or series-multiple lighting will be approved.

89 *d.* Under no circumstances can series lamps be attached to gas fixtures.

Class C.

Incandescent (Low Pressure) Systems.

300 Volts or Less.

Outside Conductors.

15.—Outside Overhead Conductors:—

a. Must be erected in accordance with the rules for arc (series) circuit conductors.

b. Must be separated not less than 12 inches, and be provided with an *approval* fusible cut-out, that will cut off the entire current as near as possible to the entrance to the building and inside the walls.

16.—Underground Conductors:—

a. Must be protected against moisture and mechanical injury, and be removed at least two feet from combustible material when brought into a building, but not connected with the interior conductors.

b. Must have a switch and a cut-out for each wire between the

underground conductors and the interior wiring when the two parts of the wiring are connected.

These switches and fuses must be placed as near as possible to the end of the underground conduit, and connected therewith by specially insulated conductors, kept apart not less than two and a half inches.

c. Must not be so arranged as to shunt the current through a building around any catch box.

Inside Wiring.

General Rules.

17.—At the entrance of every building there shall be an *approved* switch placed in the service conductors by which the current may be entirely cut off.

18.—Conductors:

a. Must have an *approved* insulating covering, and must not be of sizes smaller than No. 14 B. & S., No. 16 B. W. G., [of] No. 4 E. S. G.

b. Must be protected when passing through Floors; or through walls, partitions, timbers, etc., in places liable to be exposed to dampness by waterproof, non-combustible, insulating tubes, such as glass or porcelain, except that in cases where it is impossible to use a rigid tube, an *approved* flexible tube may be permitted.

90 Must be protected when passing through walls, partitions, timbers, etc., in places not liable to be exposed to dampness by *approved* insulating bushings specially made for the purpose.

c. Must be kept free from contact with gas, water, or other metallic piping, or any other conductors or conducting material which they may cross (except high potential conductors) by some continuous and firmly fixed non-conductor.

d. Must be so placed in crossing high potential conductors that there shall be a space of at least twelve inches (12 inches), or greater where required by special conditions, at all points between high and low tension conductors.

e. Must be so placed in wet places that an air space will be left between conductors and pipes in crossing, and the former must be run, in such a way that they cannot come in contact with the pipe accidentally. Wires should be run over all pipes upon which condensed moisture is likely to gather, or which, by leaking, might cause trouble on a circuit.

Special Rules.

19.—Wiring not Encased in Moulding or Approved Conduit:

a. Must be supported wholly on non-combustible insulators, constructed so as to prevent the insulating coverings of the wire from

coming in contact with other substances than the insulating supports, except that wood cleats may be used in places not liable to moisture where mouldings would be allowed and where mechanical protection of the wire is not necessary. Such cleats to be filled with moisture-proof compound. A filled or finished wood work will be accepted in lieu of the backing of the cleat.

b. Must be so arranged that wires of opposite polarity, with a difference of potential of 150 volts or less, will be kept apart at least two and one-half inches.

c. Must have the above distance increased proportionately where a higher voltage is used, unless they are encased in moulding or approved conduit.

d. Must not be laid in plaster, cement or similar finish, except when the walls or ceilings are of fireproof material—brick or tile. No joints will be allowed under plaster.

e. Must never be fastened with staples.

In unfinished lofts, between floor and ceilings, in partitions, and other concealed places—

f. Must have at least one-half inch clear air space surrounding them, and where wires pass through joints, beams, etc., must conform to Rule 19 (*b*).

g. Must be at least ten inches apart when possible, and should be run singly on separate timbers or studding.

91 *h.* Wires run as above immediately under roofs, in proximity to water tanks or pipes, will be considered as exposed to moisture.

i. Wires must not be fished for any great distance and only in places where the Inspector can satisfy himself that the above rules have been complied with.

j. Twin wires must never be employed in this class of concealed work.

20.—Mouldings:—

a. Must never be used in concealed work or in damp places.

b. Must have at least two coats of water proof paint or be impregnated with a moisture repellant.

c. Must be made in two pieces, a backing and a capping, with a bridge one-half inch wide and must afford suitable protection against abrasion. Filled or finished wood work will be accepted in lieu of backing for moulding

21.—Special Wiring:—

In breweries, packing houses, stables, dyehouses, paper and pulp mills, or other buildings specially liable to moisture or acid, or other fumes liable to injure the wires or insulation, except where used for pendants, conductors—

a. Must be separate- at least six inches.

b. Must be provided with an *approved* waterproof covering.

c. Must be carefully put up.

d. Must be supported by glass or porcelain insulators. No switches

or fusible cut-outs will be allowed where exposed to inflammable gases or dust, or to flying of combustible materials.

e. Must be protected when passing through floors, walls, partitions, timbers, etc., by water-proof, non-combustible, insulating tubes, such as glass or porcelain.

f. The wires in passing through floors should be protected to a height of eight feet by a box so constructed as to allow an air space around the wire. The joint between box and floor to be made water-proof by a quarter round molding laid in tar. Where this construction is followed wires may be run through floor without insulating tubes, provided a similar air space be maintained.

22.—Interior Conduits:—

a. Must be continuous from one junction box to another, or to fixtures and must be of material that will resist the fusion of the wire or wires they contain, without igniting the conduit.

b. Must not be of such material or construction that the insulation of the conductor will ultimately be injured or destroyed by the elements of the composition.

c. Must be first installed as a complete conduit system, without conductors, strings or anything for the purpose of drawing
92 in the conductors, and the conductors then to be pushed or fished in. The conductors must not be placed in position until all mechanical work on the building has been, as far as possible, completed.

d. Must not be so placed as to be subject to mechanical injury by saws, chisels or nails.

e. Must not be supplied with a twin conductor, or two separate conductors, in a single tube.

f. Must have all ends closed with good adhesive material, either at junction boxes or elsewhere, whether such ends are concealed or exposed. Joints must be made air-tight and moisture proof.

g. Conduits must extend at least one inch beyond the finished surface of walls or ceilings until the mortar or other material be entirely dry, when the projection may be reduced to half an inch.

23.—Double Pole Safety Cut-Outs:—

a. Must be in plain sight or enclosed in an *approved* box, readily accessible.

b. Must be placed at every point where a change is made in the size of the wire (unless the cut-out in the larger wire will protect the smaller).

c. Must be supported on bases of non-combustible, insulating, moisture-proof material.

d. Must be supplied with a plug (or other device for enclosing the fusible strip or wire) made of non-combustible and moisture-proof material, and so constructed that an arc cannot be maintained across its terminals by the fusing of the metal.

e. Must be so placed that no group of lamps requiring current of more than five amperes shall be ultimately dependent upon one

cut-out Special permission may be given for departure from the above.

f. All cut-out blocks must be stamped with their maximum safe-carrying capacity in amperes.

24.—Safety Fuses:—

a. Must all be stamped or otherwise marked with the number of amperes at which they will fuse.

b. Must have fusible wires or strips, where the plug or equivalent device is not used, and where over five amperes of current is carried with surfaces or tips of harder metal, soldered or otherwise, having perfect electrical connection with the fusible part of the strip.

c. Must all be so proportioned to the conductors they are intended to protect that they will melt before the maximum safe-carrying capacity of the wire is exceeded.

93 25.—Table of Capacity of Wires:—

It must be clearly understood that the size of the fuse depends upon the size of the smallest conductor it protects, and not upon the amount of current to be used on the circuit. Below is a table showing the safe-carrying capacity of conductors of different sizes in Brown & Sharpe gauge, which must be followed in the placing of interior conductors:

Table A. Concealed work.		Table B. Open work.	
B. & S. G.	Amperes.		Amperes.
0000.....	218.....		312
000.....	181.....		262
00.....	150.....		220
0.....	125.....		185
1.....	105.....		156
2.....	88.....		131
3.....	75.....		110
4.....	63.....		92
5.....	53.....		77
6.....	45.....		65
8.....	33.....		46
10.....	25.....		32
12.....	17.....		23
14.....	12.....		16

26.—Switches:—

a. Must be mounted on moisture-proof and non-combustible bases, such as slate or porcelain.

b. Must be double pole when the circuits which they control supply more than five (5) amperes of current.

c. Must have a firm and secure contact; must make and break readily and not stop when motion has once been imparted by the handle.

- d. Must have carrying capacity sufficient to prevent heating.
- e. Must be placed in dry, accessible places and be grouped as far as possible, being mounted—when practicable—upon slate or equally non-combustible back boards. Jack-knife switches, whether provided with friction or spring stops, must be so placed that gravity will tend to open rather than close the switch.

27.—Fixture Work:—

a. In all cases where conductors are concealed within, the latter must be insulated from the gas pipe system of the building by means of *approved* joints. The insulating material used in such joints must be of a substance not affected by gas, and that will not shrink or crack by variation in temperature. Insulating joints, with soft rubber in their construction, will not be approved.

b. Supply conductors, and especially the splices to fixture wires, must be kept clear of the grounded part of gas pipes, and where shells are used the latter must be constructed in a manner affording sufficient area to allow this requirement.

c. Fixtures must never be wired outside.

d. All conductors for fixture work must have a solid water-proof insulation that is durable and not easily abraded, and must not in any case be smaller than No. 18 B. & S., No. 20 B. W. G., No. 2 E. S. G.

e. All burrs or fins must be removed before the conductors are drawn into a fixture.

f. The tendency to condensation within the pipes should be guarded against by sealing the upper end of the fixture.

g. No combination fixture in which the conductors are concealed in a space less than one fourth inch between the inside pipe and the outside casing will be approved.

h. Each fixture must be tested for "contacts" between conductors and fixtures, for "short circuits," and for ground connections before the fixture is connected to its supply conductors.

i. Ceiling blocks of fixtures should be made of insulating material; if not, the wires in passing through the plate must be surrounded with hard rubber tubing.

28.—Arc Lights on Low Potential Circuits:—

a. Must be supplied by branch conductors which will carry a current twenty-five per cent. in excess of the rated capacity of the lamps.

b. Must be connected with main conductors only through double pole cut-outs.

c. Must only be furnished with such resistances or regulators as are enclosed in non-combustible material, such resistances being treated as stoves.

Incandescent lamps must not be used for resistance devices.

d. Must be supplied with globes and protected as in the case of arc lights on high potential circuits.

29.—Electric Gas Lighting:—

Where electric gas lighting is to be used on the same fixture with an electric light—

a. No part of the gas piping shall be in electrical connection with the gas lighting circuit.

b. The wires used with the fixtures must have a non-inflammable insulation, or, where concealed between the pipe and shell of the fixture, the insulation must be such as required for fixture wiring for the electric light.

c. The whole installation must test free from "grounds."

95 *d.* The two installations must test perfectly free from connection with each other.

30.—Sockets:—

a. No portion of the lamp socket exposed to contact with outside objects must be allowed to come into electrical contact with either of the conductors.

b. In rooms where inflammable gases may exist, the incandescent lamp and socket must be enclosed in a vapor-tight globe.

c. No key socket shall be used for a lamp consuming over one ampere of current.

31. Flexible Cord:—

a. Must be made of conductors, each surrounded with a moisture-proof and non-inflammable layer, and further insulated from each other by a mechanical separator of carbonizable material. Each of these conductors must be composed of several strands.

b. Must not sustain more than one light not — exceed 50-candle power.

c. Must not be used except for pendants or for portable lamps or motors when protected by individual fuse.

d. Must not be used in show windows.

e. The ends of the cord must be protected by insulating bushings where the cord enters the socket.

f. Must be so suspended that the entire weight of the socket and lamp will be borne by knots under the bushings in the socket, and above the point where the cord comes through the ceiling block or rosette, in order that the strain may be taken from the joints and binding screws.

g. Should be equipped with keyless sockets, as far as practicable, and be controlled by wall switches.

Class D.**Alternating Systems—Converters or Transformers.****32.—Converters:—**

a. Must not be placed inside of any building, except the Central Station, unless by special permission.

b. Must not be placed in any but metallic or other non-combustible cases.

c. Must not be attached to the outside wall of any frame or wooden building, nor shall it be attached to any brick or stone building unless separated therefrom by substantial insulating supports and be protected by a hood or other device as may be required by the City Electrician or person in charge of said department.

96 In those Cases where it may not be Possible to Exclude the Converters and Primary Wires entirely from the Building, the Following Precautions must be Strictly Observed:—

33. Converters should be located at a point as near as possible to that at which the primary wires enter the building, and must be placed in a room or vault constructed of or lined with fire-resisting material, and used only for the purpose. They must be effectually insulated from the ground, and the room in which they are placed be practically air-tight, except that it shall be thoroughly ventilated to the outdoor air, if possible, through a chimney or flue.

34.—Primary Conductors:—

a. Must each be heavily insulated with a coating of moisture-proof material from the point of entrance to the transformer, and, in addition, must be so covered and protected that mechanical injury to them or contact with them shall be practically impossible.

b. Must each be furnished, if within a building, with a switch and a fusible cut-out where the wires enter the building, or where they leave the main line, on the pole or in the conduit. These switches should be enclosed in secure and fire-proof boxes preferably outside the building.

c. Must be kept apart at least ten inches, and at the same distance from all other conducting bodies when inside a building.

35.—Secondary Conductors:—

a. Must be installed according to the rules for "Low Potential Systems."

Class E.

Electric Railways.

36. All rules pertaining to are light wires and stations shall apply (so far as possible) to street railway power stations and their conductors in connection with them.

37. Power Stations:

a. Must be equipped in each circuit as it leaves the station with an *approved* automatic "breaker", or other device that will immediately cut off the current in case the trolley wires become grounded. This device must be mounted on a fireproof base, and in full view and reach of the attendant.

38. Trolley Wires:

a. Must be no smaller than No. 1, B. & S. copper or No. 4, B. & S. silicon bronze, and must readily stand the strain put upon them when in use.

97 *b.* Must be well insulated from their supports, and in case of the side or double pole construction, the supports shall also be insulated from the poles immediately outside of the trolley wire.

c. Must be capable of being disconnected at the power house, or of being divided into sections, so that in case of fire in the railway route the current may be shut off from the particular section, and not interfere with the work of the firemen. This rule also applies to *feeders*.

d. Must be safely protected against contact with all other conductors.

39.—Car Wiring:

a. Must be always run out of reach of the passengers, and must be insulated with a waterproof insulation.

40.—Lighting and Power from Railway Wires:

a. Must not be permitted, under any pretense, in the same circuit with trolley wires with a ground return nor shall the same dynamo be used for both purposes, except in street railway cars, electric car houses, and their power stations.

41.—Car Houses:

Must have special cut-outs located at a proper distance outside, so that all circuits within any car house can be cut out at one point.

42.—Ground Return Wires:

Where ground return is used it must be so arranged that no difference of potential will exist greater than five volts to 50 feet, or 50 volts to the mile between any two points in the earth or pipes therein.

Class F.

43.—Storage or Primary Batteries:

a. When current for light and power is taken from primary or secondary batteries, the same general regulations must be observed as apply to similar apparatus fed from dynamo generators developing the same difference of potential.

b. All secondary batteries must be mounted on *approved* insulators.

c. Special attention is directed to the rules for rooms where acid fumes exist.

d. The use of any metal liable to corrosion must be avoided in connections of secondary batteries.

44. *a.* The wiring of each completed installation must have an insulation resistance of one megohm per mile of conductor.

b. Ground wires for light-ing arresters of all classes, and ground detectors, must not be attached to gas pipes within the building.

c. No other electric service wires will be allowed in the same race-ways or ducts with electric light wires.

d. The following formula for soldering fluid is suggested:

Saturated solution of zinc.....	5 parts
Alcohol	4 parts
Glycerine	1 part

Definitions.

Definitions of the word *Approved* as used in these Rules:

Rule 2.—Care and Attendance:

Approved waste cans shall be made of metal, with legs raising can three inches from the floor, and with self-closing covers.

Rule 8.—Motors:

SECTION c. From the nature of the question, the decision as to what is an *approved* case must be left to the Inspector to determine in each instance.

Rule 12.—Interior Conductors:

SECTION a. Flexible tubing is approved as specified under this rule.

SECTION d. Insulation that will be *approved* for interior conductors must be solid, at least 7-100 of an inch in thickness, and covered with a non-inflammable substantial braid. It must not readily carry fire, must show an insulating resistance of one megohm per mile after two weeks' submersion in water 70 degrees Fehrenheit, and three days' submersion in lime water, with a current of 550 volts and after three minutes, electrification.

SECTION f. Flexible tubing is approved as specified under this rule.

Rule 13.—Arc Lamps:

SECTION c. The hand switch to be approved, if placed anywhere except on the lamp itself, must comply with requirements for switches on hanger boards as laid down in new Section (g) of Rule 13.

SECTION f. An *approved* spark arrester is one which will so close the upper orifice of the globe that it will be impossible for any sparks thrown off by the carbide to escape.

99 Rule 15.—Outside Overhead Conductors:

SECTION b. An *approved* fusible cut-out must comply with the sections of Rules 23 and 24 describing fuses and cut-outs.

Rule 17:

The switch required by this rule to be *approved* must be double pole, must plainly indicate whether the current is "on" or "off," and must comply with Sections a, c, d and e of Rule 26 relating to switch.

Rule 18.—Conductors:

SECTION a. The insulating covering of the wire, to be *approved* must be solid, at least 3-64 of an inch in thickness, and covered with

a non-inflammable substantial braid. It must not readily carry fire, must show an insulating resistance of one megohm per mile after two weeks' submersion in water at 70 degrees Fahrenheit, and three days' submersion in lime water, with a current of 550 volts and after three minutes' electrification.

SECTION *b*. Second paragraph. Except for Floors, and for places liable to be exposed to dampness, Glass, Porcelain, *Metal-sheathed Interior Conduit*, and *Vulca Tube*, when made especially for bushings, will be *approved*. The two last named will not be approved if cut from the usual lengths of tube made for conduit work, nor when made without a head or flange on one end.

Rule 21.—Special Wiring:

SECTION *b*. The insulating covering of the wire to be *approved* under this section must be solid, at least 3-64 of an inch in thickness, and covered with a non-inflammable substantial braid. It must not readily carry fire, must show an insulating resistance of one megohm per mile after two weeks' submersion in water 70 degrees Fahrenheit, and three days' submersion in lime water with a current of 550 volts after three minutes' electrification, and must *also* withstand a satisfactory test against such chemical compounds or mixtures as it will be liable to be subjected to in the risk under consideration.

Rule 23.—Double Pole Safety Cut-Outs:

SECTION *a*. To be *approved*, boxes must be constructed, and cut-outs arranged, whether in a box or not, so as to obviate any danger of the melted fuse metal coming in contact with any substance which might be ignited thereby.

Rule 27.—Fixture Work:

SECTION *a*. Insulating joints to be approved must be entirely made of material that will resist the action of illuminating gases, and will not give way or soften under the heat of an ordinary gas flame. They shall be so arranged that a deposit of moisture will not destroy the insulating effect, and shall have an insulating resistance of 250,000 ohms between the gas pipe attachments, and be sufficiently strong to resist the strain they will be liable to in attachment.

Rule 37.—Power Stations:

SECTION *a*. Automatic circuit breakers should be submitted for *approval* before being used.

Rule 43.—Storage or Primary Batteries:

SECTION *b*. Insulators for mounting secondary batteries to be *approved* must be non-combustible, such as glass, or thoroughly vitrified and glazed porcelain.

Notice of the Approval of Certain Wires and Materials and the Interpretation of Certain Rules.

Rule 4.—Switch Boards:

SECTION *a*. Special attention is called to the fact that switch boards should not be built down to the floor, nor up to the ceiling, but a space of at least eighteen inches or two feet, should be left between the floor and the board, and between the ceiling and the board, in order to prevent fire from communicating from the switch board to the floor or ceiling, and also to prevent the forming of a partially concealed space very liable to be used for storage or rubbish and oily waste.

Rule 5.—Resistance Boxes:

SECTION *a*. The word "frame" in this section relates to the entire case and surrounding of the rheostat, and not alone to the upholding supports.

Rule 9.—Resistance Boxes:

SECTION *a*. The word "frame" in this section relates to the entire case and surrounding of the rheostat, and not alone to the upholding supports.

Class B:

Any circuit attached to any machine, or combination of machines which develop over 300 volts difference of potential between any two wires, shall be considered as a high potential circuit, and coming under that class, unless an *approved* transforming device is used, which cuts the difference of potential down to less than 300 volts.

Rule 10.—Outside Conductors:

SECTION *f*. All joints must be soldered, even if made with the McIntyre or any other patent splicing device. This ruling
101 applies to joints and splices in all classes of wiring covered by these Rules.

Rule 15.—Outside Overhead Conductors:

SECTION *b*. The cut-out required by this section must be placed so as to protect the switch required by Rule 17.

Rule 16.—Underground Conductors:

SECTION *b*. The cut-out required by this section must be placed so as to protect the switch.

Rule 22.—Interior Conduits:

The American Circular Loom Co. Tube, the Interior Conduit Tube, and the Vulca Tube are approved for the class of work called for in this rule.

Materials.

The following are given as a list of Non-Combustible, Non-[Absorptive], Insulating Materials, and are listed here for the benefit

of those who might consider hard rubber, fiber, wood, and the like, as fulfilling the above requirements. Any other substance which it is claimed should be accepted, must be forwarded for testing before being put on the market:

1. Thoroughly vitrified and glazed porcelain.
2. Glass.
3. Slate without metal veins.
4. Pure sheet mica.
5. Marble. (filled)
6. Lava. (certain kinds of)
7. Alberene stone.

Wires.

The following wires having been accepted by the Underwriters' International Electric Association, we shall accept them until further notice. Due notice will be given of additions or corrections to the list:

- Americanite.
- Bishop.
- Canvasite.
- Crescent.
- Crown.
- Clark.
- Edison Machine.
- Grimshaw (white core)
- Habirshaw (red core)
- Kerite
- National India Rubber Co. (N. I. R.)
- Okonite
- 102 Paronite
- Raven Core
- Requa white core
- Safety Insulated
- Safety black core
- Salamander (rubber covered)
- Simplex (caoutchouc)

None of the above wires to be used unless protected with a substantial *braided* outer covering.

SEC. 14. That all companies, firms, corporations or individuals doing wiring, for arc, incandescent lighting, or for motors, shall first procure a license from the City Clerk or other person authorized by law or ordinance to issue licenses, upon the payment of five (\$5.00) dollars, and passing an examination before an examining Board, composed of the City Electrician or other person in charge of said office, the Superintendent of the City Fire and Police Alarm, and the City Gas Inspector; which fact shall be certified to the City Clerk by the City Electrician or other person in charge of said department (the City Electrician to the ex-officio secretary of said examining Board) showing that said applicant is competent and qualified to do and perform all the work required by this ordinance in a safe,

workmanlike and reliable manner and that license should issue to such applicant. Provided that before such license shall issue, said company, firm, corporation or individual shall deposit with the City Treasurer the sum of fifty dollars (\$50.00) by him to be held and known as an Electrical Fund, to be used only to make good any defect or damage caused by negligence, defective or inferior work of the party making such deposit, and upon the expiration of such license to be returned by order of the Mayor and Council upon a certificate being filed with the City Clerk by the City Electrician or other person in charge of said department that there are no charges against or demands due from such person; and Provided further, that the company, firm, corporation or individual shall give a bond to the City in the sum of one thousand dollars conditioned that they will in good faith perform all the things required of them under the provisions of this ordinance; said bond to be approved by the Mayor and Council and to be filed with the City Clerk.

SECTION 15. Any person, company or corporation who shall violate any of the provisions of this ordinance, or fail, neglect or refuse to comply with the rules and provisions of this ordinance or who shall refuse, fail or neglect to comply with any order or request of the City Electrician or other officer in charge of said department in pursuance of and by the authority of any of the provisions of this ordinance or rules therein contained, shall be deemed guilty of a misdemeanor, and upon conviction thereof in the Police Court shall be fined in any sum not less than twenty dollars nor more than two hundred dollars or be imprisoned not exceeding thirty (30) days, or be both fined and imprisoned at the discretion of the Court.

SECTION 16. That Ordinance No. 3391 be and the same is hereby repealed.

SECTION 17. That this ordinance shall take effect and be in force from and after its passage.

Passed March 20, 1894.

[SEAL.]

W. C. WAKELEY,
City Clerk.
EDWARD E. HOWELL,
President City Council.

Approved March 26th, 1884.

GEO. P. BEMIS, *Mayor.*

I hereby certify that the foregoing is a true and correct copy of the original document now on file in the City Clerk's Office.

[SEAL.]

DAN B. BUTLER,
City Clerk.

By F. H. DAILEY, *Dep.*

Fee, \$5.00, paid by W. W. Morsman.

Endorsed: Filed Aug. 31, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit:—On the 31st day of August, 1908, Copy of City Ordinance No. 4366 was filed in said case, which said Copy is in words and figures following, to-wit:—

Ordinance No. 4366.

An ordinance defining the duties of the city electrician and establishing rules and regulations concerning electric work, wires, and poles, and providing penalties for the violation of the provisions of said ordinance and rules established thereunder and by virtue thereof; also to repeal ordinance No. 3791 & 3792.

Be it Ordained by the City Council of the City of Omaha:

SECTION 1. No electric current shall be used for illumination, decoration, power or heating, except as hereinafter provided.

SEC. 2. All persons, firms or corporations desiring to make use of electric currents for any of the purposes mentioned in the preceding section of this ordinance shall, before commencing or doing
104 any electrical construction work of any kind whatever, either installing new apparatus or repairing apparatus already in use, or changing the plan of wiring of any building or section thereof, file plans and specifications showing such apparatus or wiring and an application for a permit therefor in the office of the city electrician, which shall describe in detail the plan of construction and material and apparatus it is desired to use, giving the locality by street and number, and upon receipt of which application, if found proper, such permit shall be given.

SEC. 3. The said city electrician shall have power, and it shall be his duty, when by him deemed necessary, to carefully inspect any such installation previous to and after its completion, and it shall be competent for him to remove any existing obstructions which may prevent a perfect inspection of the current-carrying conductors, such as laths, plastering, boarding, or flooring; and if such installation shall prove to have been constructed in accordance with the rules and requirements of the city of Omaha, controlling the use of electric currents, he shall issue a certificate of such inspection, which shall contain a general description of the installation and the date of said inspection. The use of electric current is hereby declared to be unlawful previous to the issuance of said certificate, or if said certificate be revoked; provided, however, the city electrician may issue a temporary permit for the use of electric current during the course of construction or alteration of buildings, which permit shall expire when the electrical apparatus for such building is fully installed.

SEC. 4. A preliminary certificate may be issued by said city electrician in the case of completed installation, but upon which no current will be used in the immediate future. Such preliminary certificate shall show that at the date of inspection the installation was erected in accordance with the terms of this ordinance. Prior to the introduction of electric current into the said premises, a second inspection shall be made, when, if the said installation is still in accordance with the terms of this ordinance, a complete and final certificate shall issue. Any owner or owners of property installing electric wires to be hidden from view shall, prior to covering such wires, give said city electrician a reasonable notice in order to give ample time for inspection.

SEC. 5. It shall be unlawful for any person, company, association or corporation to make any excavation in any street, alley or sidewalk or public ground in the City of Omaha, or to erect any poles therein for the purpose of placing or stringing any wires
105 thereon, any telegraph, telephone, electric light or power wire, or to place any conductors for the carrying of electric energy for light, heat power or any other purpose, without first obtaining a written permit and authority so to do from the city electrician, and after making application for such authority and permit. Such application shall state in detail the location, number, height and size of the poles to be erected, the sizes and insulation of wires, the amount to be strung and for what purpose they are to be used, and all such poles and conductors shall be erected in such manner only as said city electrician shall authorize, permit and direct.

SEC. 6. The said city electrician is hereby empowered and it is made his duty to regulate and determine the placing of poles, the placing, stringing or attaching of telegraph, telephone, district, electric light, power and other wires used for transmitting electrical energy and their supports so as to prevent fire, accident or injury to persons or property, and to cause all electric conductors, apparatus and their supports to be so placed, constructed and guarded as not to cause fires, accidents or endanger life or property, and any and all of such conductors, apparatus and their supports now existing, as well as those hereafter constructed and placed, shall be subject to such regulations.

SEC. 7. The said city electrician is hereby empowered and it is made his duty to inspect or re-inspect all overhead, underground and interior wires, apparatus and their supports used for conducting electric current for light, heat or power at least once each year, and when said conductors, apparatus or their supports are found to be unsafe to life or property, shall notify the persons, firms or corporations owning, using or operating them to place the same in a safe and secure condition within forty-eight (48) hours. Any person, firm or corporation failing or refusing to repair, change or remove the same within forty-eight (48) hours after the receipt of such notice, shall be subject to a penalty of ten dollars (\$10) for each and every day such conductors, apparatus or their supports continue to be in an unsafe condition.

SEC. 8. That the said city electrician shall have the power to cause the removal of all electrical conductors, apparatus or their supports, or the turning off of the current from any circuit or building if not in compliance with the rules of this ordinance or where the same interfere with the work of the fire department.

SEC. 9. That the city electrician shall cause all wires and poles that have not been used for thirty (30) days, and which are known as "dead wires", or "dead poles" to be removed at the expense
106 of the owners, and during said period when said wires are not used they shall be kept in as safe a condition as the wires in use. All dead wires of telephone companies shall be detached from the building in which the same have been used, and they shall be grounded at the pole nearest said building.

SEC. 10. That all fees herein required shall be paid to the city

treasurer, who shall receipt for the same in duplicate, one of which receipts shall be filed in the office of the city electrician before any permit or certificate required by this ordinance or its rules shall be issued.

SEC. 11. There shall be charged by the city electrician for the issuance of permits to erect and place electric conductors and apparatus the following fees:

For arc lamp installation the sum of.....	\$1.00
For each incandescent lamp of nominal 16 candle power (and for larger or smaller lamps in that proportion) not exceeding 100 16 candle power lamps, the sum of.....	.05
For each additional 16 candle power lamp above 100 16 candle power lamps, an additional sum of.....	.02
But no permit shall be issued for incandescent lamps for a less amount than the sum of \$1.00.	
For motors of one electrical horse power (746 watts) or frac- tional horse power, the sum of.....	1.00
For each horse power or fraction thereof above one (1) horse power an additional sum of.....	.25
Dynamos to be rated as motors, except when installed in connection with lamps or other translating devices, in which case the charge shall be made for the lamps only, as specified in this section.	
But no charge to exceed the sum of Ten Dollars (\$10.00) shall be made for any one motor or dynamo installation.	
Fan-motors on incandescent lamp circuits shall be rated as incandescent lamps.	
For permits of temporary installation shall be charged the sum of.....	1.00
Provided, however, that no such permit and certificate shall be issued for any longer time than 30 days.	
For each outside construction permit the sum of....	1.00
107 And for each pole set under such permit the addi- tional sum of25
Provided, that fees for permit as specified in this section shall cover all costs of inspection and certificate of in- spection.	
Inspection fees shall be charged for the annual re-inspection of isolated electric light plants and all outside work at the rate of, per hour.....	.50

SEC. 12. That the city electrician shall keep or cause to be kept a full and complete daily record of all work done, permits issued, examinations made, or other official work performed, and render a full report thereof to the mayor and city council on or before the first Tuesday of January of each year.

SEC. 13. No alterations shall be made in any installation without first notifying the said city electrician and submitting the same for similar inspection as above provided.

SEC. 14. All persons, firms or corporations engaged in commercial lighting and power transmission, and furnishing current to consu-

mers, shall on the first day of each month furnish the city electrician with a statement of the number of arc, incandescent lamp and motor installations connected by them to their system, and also the number of installations of which the service has been discontinued, giving the name of subscribers and locality by street and number.

SEC. 15. The said city electrician shall have the right, and it is made his duty, to prescribe from time to time, reasonable rules and regulations for carrying out and enforcing the provisions of this ordinance, such rules and regulations to be approved by the mayor and council, and shall have the right to enforce the same as well as the provisions of this ordinance.

SEC. 16. That all companies, firms, corporations or individuals doing wiring for arc, incandescent light, for motors, electric light fixtures, gas lighting, house annunciators, telephone, automatic fire alarms, and outside construction for light, heat, power, telephone, telegraph or district service, shall first procure a general permit from the city electrician, upon the payment of Five Dollars (\$5.00) and passing an examination before an examining board composed of the city electrician, city engineer, and the chief of the fire department (the city electrician to be ex-officio secretary of said examining board), showing that said applicant is competent and qualified to do and engage in such work. Provided that before such permit shall issue, said company, firm, corporation or or individual shall deposit with the City Treasurer the sum of \$50.00 by him to
108 be held and known as an electrical fund, to be used only to make good any defect or damage caused by negligence, defective or inferior work of the party making such deposit and upon the expiration of such permit to be returned by order of the Mayor and Council upon a certificate being filed with the City Clerk by the City Electrician and be it further provided that before such permit shall issue, said company, firm, corporation or individual shall give a bond to the city in the sum of One Thousand Dollars (\$1,000), conditioned that they will in good faith perform all the things required of them under the provisions of this ordinance; said bond to be approved by the mayor and council and to be filed with the city clerk.

SEC. 17. Any person, company or corporation who shall violate any of the provisions of this ordinance or fail, neglect or refuse to comply with the rules and provisions of this ordinance, or who shall interfere and tamper with any electrical apparatus and current carrying conductors, or who shall refuse, fail or neglect to comply with any order or request of the city electrician in pursuance of and by the authority of any of the provisions of this ordinance or rules therein contained, shall be deemed guilty of a misdemeanor, and upon conviction thereof in the police court shall be fined in any sum not less than Ten Dollars (\$10.00) nor more than Two Hundred Dollars (\$200.00), or be imprisoned not exceeding thirty (30) days, or be both fined and imprisoned at the discretion of the court.

SEC. 18.—

Rules and Requirements of the City of Omaha, Nebraska, for the Installation of Overhead and Underground Wires.

Rule 1. Before any wires, cables or conductors are run for any purpose on poles or fixtures or from the top of any building to the point of entering any building for service, or over the roofs of buildings, notice shall be served by the party doing the work to the city electrician.

Rule 2. When a line is completed and ready for inspection, a report must be made in writing stating to what poles and fixtures the same has been attached, and no current shall be transmitted over such line until a certificate of inspection has been issued therefor by the city electrician.

SEC. 19. That the rules and regulations of the National Board of Fire Underwriters known as "The National Electric Code" of 1897 be and are hereby adopted as the rules and requirements of the city of Omaha, Nebraska, for electrical construction work.

109 SEC. 20. That ordinance No. 3791 entitled "An Ordinance defining the duties of the city electrician and establishing rules and regulations concerning electrical work, wires and poles and providing penalties for the violation of the provisions of said ordinance, and rules established thereunder and by virtue thereof; also to repeal ordinance No. [3391] and also ordinance 3792, be and the same is hereby repealed.

SEC. 21. That this ordinance shall take effect and be in force from and after its passage.

Passed Mar. 1, 1898.

[SEAL.]

BEECHER HIGBY,
City Clerk.
W. W. BINGHAM,
President City Council.

Approved March 3, 1898.

FRANK E. MOORES, *Mayor.*

I hereby certify that the foregoing is a true and correct copy of the original document now on file in the City Clerk's office.

[SEAL.]

DAN B. BUTLER,
City Clerk,
By F. H. DAILEY, *Dep.*

Fee, \$1.75, paid by W. W. Morsman.

Endorsed: Filed Aug. 31 1908, Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 31st day of August, 1908, Copy of Ordinance No. 5051 was filed in said case, which said Copy of Ordinance No. 5051 is in words and figures following, to-wit:

Ordinance No. 5051.

An ordinance requiring all electric and other wires, when used for electric light, heat, power and other commercial purposes, excepting those used for propelling street cars, and telegraph and telephone wires to be placed underground in a portion of the City of Omaha.

Be it Ordained by the City Council of the City of Omaha:

SECTION 1. That all persons and companies owning, maintaining or operating electric wires or other wires in the City of Omaha, and in the district hereinafter defined, for the transmission of electricity for light, heat and power, shall on or before the first day of May, 1903, place underground all such wires, and after said date, no persons or companies shall be permitted to maintain in said district in any streets, alleys, or public grounds of said City any electric or other wires, without first complying with the provisions of
110 this ordinance, excepting however such feeder and trolley wires as may be used for propelling street cars and telegraph and telephone wires.

SECTION 2. The district mentioned in section one (1) of this ordinance, shall be that portion of the City bounded on the east by Eighth Street, on the west by Eighteenth street, on the south by Howard street, and on the North by Capitol Avenue, but nothing herein contained shall be construed to prevent the enlargement of such district from time to time as the growth of the City may require.

SECTION 3. For the purpose of complying with the requirements of this ordinance all persons or companies shall, on or before the expiration of the time aforesaid, construct in the streets and alleys of the City within said district, underground conduits with all necessary appliances and devices to make the work modern, safe and efficient; all such construction shall be located in alleys, when possible, in preference to streets, and shall be located under the supervision of the City Electrician.

SECTION 4. Distributing poles for wires may be placed in the alleys between streets, providing no such pole or poles are placed within fifty feet of the curb line of said streets and in no case will overhead wires from such poles be allowed to cross the streets; For street arc lights and lighting street intersections, laterals may be run from the main subway.

SECTION 5. Before constructing any of the work hereby required, the said persons or companies shall file with the board of public works a plan and map and all necessary details of the work with specifications showing the material to be used and the method of construction to be employed all of which shall be subject to the inspection of the City Electrician; and no such construction shall be commenced until the plans and specifications shall have been approved by the Board of Public Works and all such construction shall be carried on under the direction of the Board of Public Works.

SECTION 6. All persons or companies constructing such subways shall as fast as the construction of such subways or conduit pro-

gresses, promptly fill all openings in the streets and alleys and relay all curbing, paving and guttering, which may necessarily be removed in the construction of the work, and shall pay all damages for personal and other injuries that may occur, either to private individuals or corporations as well as to the City of Omaha, resulting from or growing out of the negligence or want of care of said persons or companies in the construction of any of the work herein required.

SECTION 7. The location of the underground work herein provided for shall not interfere with sewers constructed or in progress of construction or with gas or water pipes already laid or
111 with the underground work of any telephone company, and must be located and constructed without unnecessary injury or inconvenience to the public.

SECTION 8. All the provisions of this ordinance shall be applicable to any other district hereafter created or to any part of the City which by extension of the district herein defined shall be included therein.

SECTION 9. Any person or companies who shall maintain any electric wires, or other wires, in the streets or alleys of the City of Omaha in violation of this ordinance shall on conviction be punished by a fine not exceeding One Hundred Dollars (\$100.00) and all such electric wires or other wires may be removed by the City Electrician after thirty days' notice in writing.

SECTION 10. This ordinance shall take effect and be in force from and after its passage, and approval.

Passed Mar. 5, 1902.

W. H. ELBOURN,
City Clerk.
MYRON D. KARR,
President City Council.

[SEAL.]

Approved March 8, 1902.

FRANK E. MOORES, *Mayor.*

I hereby certify that the foregoing is a true and correct copy of the original document now on file in the City Clerk's office.

[SEAL.]

DAN B. BUTLER,
City Clerk,
By F. H. DAILEY, *Dep.*

Fee, \$1.20, paid by W. W. Morsman.

Endorsed: Filed Aug. 31, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 31st day of August, 1908, Copy of City Ordinance No. 5433 was filed in said case, which said Copy of Ordinance No. 5433 is in words and figures following, to-wit:

Ordinance No. 5433.

An Ordinance Amending Sections 1 and 2 of Ordinance Number 5051 Approved March 8th, 1902, and Repealing said Sections as Heretofore Existing.

Be it Ordained by the City Council of the City of Omaha:

SECTION 1. That Sections 1 and 2 of Ordinance No. 5051, approved March 8th, 1902, be and the same are hereby amended to read as follows:

112 "SECTION 1. That all persons and companies owning, maintaining or operating electric wires or other wires in the City of Omaha and in the district hereinafter defined, for the transmission of electricity for light, heat and power, shall, on or before the 1st day of October, 1905, place underground all such wires and after said date no person or companies shall be permitted to maintain in said district in any streets, alleys or public grounds of said city, any electric or other wires, without first complying with the provisions of this ordinance, excepting, however such feeder and trolley wires as may be used for propelling street cars, and telegraph and telephone wires.

SECTION 2. The district mentioned in Section 1 of this ordinance shall be that portion of the city bounded on the east by the center line of Eighth Street; on the south, from the center line of Eighth Street to the center line of Thirteenth Street, by the center line of Leavenworth street; on the west, from the center line of Leavenworth Street to the center line of Jackson Street, by the center line of Thirteenth Street; on the south, from the center line of Thirteenth Street to the center line of Eighteenth Street, by the center line of Jackson Street; on the west, from the center line of Jackson Street to the center line of Capitol Avenue, by the center line of Eighteenth Street; and on the north by the center line of Capitol Avenue; but nothing herein contained shall be construed to prevent the enlargement of said district from time to time as the growth of the city may require."

SECTION 2. Sections 1 and 2 of Ordinance No. 5051, approved March 8th, 1902, as heretofore existing, are hereby repealed.

SECTION 3. This ordinance shall take effect and be in force from and after its passage and approval.

Passed Dec. 13, 1904.

[SEAL.]

W. H. ELBOURN,
City Clerk.
H. B. ZIMMAN,
President City Council.

Approved Dec. 20, 1904.

FRANK E. MOORES, *Mayor.*

I hereby certify that the foregoing is a true and correct copy of the original document, now on file in the City Clerk's office.

[SEAL.]

DAN BUTLER,
City Clerk.
By F. H. DAILEY, *Dep.*

Fee, 70c., paid by W. W. Morsman.

113 Endorsed: Filed Aug. 31, 1908. Geo. H. Thummel,
Clerk.

Thereupon afterwards, to-wit: At the April, 1908, Term of said Court, and on the 5th day of September, 1908, the following proceedings were had and done in said case, as appear of record in Journal No. "7" of the proceedings of said Court, to-wit:

OMAHA ELECTRIC LIGHT & POWER COMPANY

vs.

THE CITY OF OMAHA et al.

105 Y.

By agreement of parties it is ordered that the hearing of this cause be and the same hereby is continued until September 28, 1908.

Thereupon afterwards, to-wit: On the 14th day of December, 1908, Assignment of Franchises, Contracts, Etc., was filed in said case, which said Assignment is in words and figures following, to-wit:

Assignment of Franchise.

Know All Men by these Presents:

The New Omaha Thomson-Houston Electric Light Company (a corporation organized under the laws of the State of Nebraska), for and in consideration of the sum of One Dollar, and other good and valuable considerations, in hand paid by Omaha Electric Light & Power Company (a corporation organized under the laws of the State of Maine), has sold and assigned and by these presents does hereby sell, assign, transfer and set over to the said Omaha Electric Light & Power Company the following contracts, rights, franchises, licenses and privileges, to-wit:

All rights, franchises, licenses, privileges and immunities granted by virtue of an ordinance known as No. 826 and entitled: "An Ordinance granting the right of way to the Omaha New Thomson & Houston Electric Light Company, and regulating the same and prescribing penalties for the violation of this ordinance", passed by the Mayor and Council of the City of Omaha in the State of Nebraska, December 16th, 1884.

Also all rights, franchises, licenses, privileges and immunities granted or created by virtue of an ordinance known as Ordinance No. 4569, and entitled: "An Ordinance amending an ordinance numbered 826, entitled 'An Ordinance granting the right of way to the Omaha New Thomson & Houston Electric Light Com-
114 pany and regulating the same and prescribing penalties for the violation of this ordinance,'" passed by the Mayor and Council of the City of Omaha, April 25th, 1899.

Also that certain contract, and all rights arising or to arise thereunder, between the New Omaha Thomson-Houston Electric Light

Company and the City of Omaha in the State of Nebraska, providing for the furnishing of electric lights to said city and which said contract was entered into as of the 4th day of March, A. D. 1902.

Also all rights, franchises, licenses, privileges and immunities granted by virtue of an ordinance known as ordinance No. 849, and entitled "An ordinance granting the right of way to the Magic City Electric Light and Power Company, regulating the same and providing penalties for interference with or injury to the property of said company," passed by the Mayor and Council of the city of South Omaha and approved April 14th, 1899.

Also all rights, franchises, licenses, privileges and immunities granted by virtue of an ordinance known as No. 889, and entitled: "An ordinance granting right of way to the South Omaha Water Works Company and regulating the same and providing penalties for the violation of this ordinance and entering into a contract between the South Omaha Water Works Company and the City of South Omaha," passed by the Mayor and Council of the City of South Omaha and approved October 26th, 1899.

Also that certain contract in writing between the South Omaha Water Works Company and the City of South Omaha, and all rights arising or to arise thereunder, providing for the furnishing of electric lights to the said city of South Omaha and which said contract was entered into as of the 26th day of October, A. D. 1899.

Also all rights, franchises, licenses, privileges and immunities granted by virtue of an ordinance known as ordinance No. 61, and entitled: "An ordinance granting to the New Omaha Thomson-Houston Electric Light Company, the right of way upon, over, through and under the streets, alleys and public grounds of the village of Dundee for the erection and maintenance of poles, wires and all other necessary instrumentalities for the transmission of electricity for light, power, heat and all other commercial purposes, prohibiting the injuring or interfering with such poles, wires and instrumentalities, and prescribing penalties for the violation thereof," passed by the Chairman and Board of Trustees of the village of Dundee in the County of Douglas and State of Nebraska, October 17th, A. D. 1902.

115 Also that certain contract and all rights arising or to arise thereunder, between the Village of Dundee in Douglas County, Nebraska, and the New Omaha Thomson-Houston Electric Light Company, providing for the furnishing of electric lights to said village, and which said contract was entered into in writing as of the 7th day of July A. D. 1903.

Also all rights, franchises, licenses, privileges and immunities granted by virtue of an ordinance of the village of Benson in the County of Douglas and State of Nebraska, entitled "An ordinance granting to the New Omaha Thomson-Houston Electric Light Company, the right of way upon and through the streets, alleys and public grounds of the village of Benson for the erection and maintenance of poles, wires and other necessary instrumentalities for the transmission of electricity for light, power, heat and all other com-

mercial purposes and which said ordinance is known as ordinance No. 36.

Also that certain contract in writing and all rights arising or to arise thereunder between the New Omaha Thomson-Houston Electric Light Company and the Village of Benson in the County of Douglas and State of Nebraska, providing for the furnishing of electric lights to said village, and which said contract was entered into on the 27th day of January, A. D. 1902.

To Have and to Hold the same and all thereof, unto the said Omaha Electric Light and Power Company, its successors and assigns forever.

The foregoing sale and transfer is made pursuant to an agreement by and between the vendor and vendee, authorized by all of the stockholders of said New Omaha Thomson-Houston Electric Light Company, at a meeting duly held for the purpose, at Omaha, Nebraska, on the 20th day of July, A. D. 1903, and authorized also by the unanimous vote of the directors of said company at a meeting held on the same day, all the members of said Board of Directors being present and voting.

In Witness Whereof, said New Omaha Thomson-Houston Electric Light Company has caused these presents to be executed in its name by its president and attested by its secretary and its corporate seal to be affixed hereto this 1st day of August, A. D. 1903.

[SEAL.]

THE NEW OMAHA THOMSON-HOUSTON
ELECTRIC LIGHT CO.,

By F. A. NASH, *President*.

Attest:

S. E. SCHWEITZER, *Secretary*.

Endorsed: Filed Dec. 14, 1908. Geo. H. Thummel, Clerk.

116 Thereupon afterwards, to-wit: On the 29th day of September, 1908. Copy of Articles of Incorporation of the New Omaha Thomson-Houston Electric Light Company was filed in said case, which said Copy is in words and figures following, to-wit:

*Articles of Incorporation of the New Omaha Thompson-Houston
Electric Light Company.*

Know All Men that we the undersigned J. C. Regan, J. E. Riley, J. W. Paddock, Geo. W. Duncan, P. G. Regan, George Canfield, Alfred Schroeder, [—] Fitzgerald and M. A. McNamara have associated ourselves together and by these presents do associate ourselves together for the purpose of forming and becoming a corporation in the state of Nebraska for the transaction of the business hereinafter described.

Article One.

The name of this corporation shall be "The New Omaha Thompson-Houston Electric Light Company.

Article Two.

The principal place of transacting the business of this corporation shall be in the City of Omaha in the County of Douglas in the State of Nebraska.

Article Three.

The general nature of the business to be transacted by said corporation shall be to purchase Electric Light-Patents, privileges and franchises and sell or otherwise dispose of same; to construct lines of wire for the transmission of electric currents from central stations through such wires, or otherwise, to produce light for the illumination of streets, public and private buildings, and for all other purposes for which such light may be used; to enter into contracts for the furnishing such electric Light to Cities, Towns, Corporations or individuals; and to furnish the same for the purposes aforesaid or for any and all other lawful purposes anywhere within the state of Nebraska; to rent, sell or otherwise dispose of all classes of Electric Light appliances; to purchase such real estate, erect such buildings, purchase, construct and use such machinery and purchase lease hold use and dispose of all such other property and material of every kind and description as may be necessary or incidental to the prosecution of said business anywhere within the said state of Nebraska.

Article Four.

The authorized capital of said corporation shall be one hundred thousand dollars divided into shares of one hundred
117 dollars each all to be fully paid up when issued and to be non assessable. The capital stock may be increased to two hundred thousand dollars by a vote representing two-thirds ($\frac{2}{3}$) of all the stock held by all the stockholders of said corporation at the time such vote shall be taken each share of such stock to represent one vote.

Article Five.

The officers of said Corporation shall be a President, Vice-President, Secretary, Treasurer, a General Manager and a Board of Directors consisting of not more than five members all of whom shall be elected by the stockholders each stockholder to cast a number of votes corresponding with the number of shares of such stock as he owns. The first election of such officers shall be held at such time as the incorporators whose names are subscribed hereto may designate but all subsequent elections shall be held at such times as the By-laws of said corporation shall fix upon and the official terms of said officers and their respective duties shall be such as said By-laws shall prescribe.

Article Six.

The business of said corporation shall be transacted by the Board of Directors thereof each director casting a number of votes corresponding with the number of shares of stock of such corporation as

he shall own and no person shall be an officer or director of such corporation who shall not be a stockholder thereof.

Article Seven.

The private property of the stockholders of this corporation shall not in any manner be liable for the debts or liabilities of the corporation nor for the debts or liabilities in any way resulting therefrom.

Article Eight.

The highest amount of indebtedness to which said corporation shall at any time subject itself shall not exceed the sum of Fifty Thousand Dollars.

Article Nine.

The existence of said corporation shall commence on the 26th day of September, A. D. 1885, and continue for the period of Twenty years unless sooner dissolved by a vote representing two-thirds of all the stock of said corporation.

Article Ten.

The powers and duties of the several officers of said corporation and the method of conducting the business thereof so far
118 as the same are not herein prescribed, shall be regulated by the By-laws of said corporation.

In Witness Whereof we have hereunto set our hands this said 26th day of September, A. D. 1885.

J. C. REGAN.
J. E. RILEY.
J. W. PADDOCK.
GEO. W. DUNCAN.
P. G. REGAN.
GEO. CANFIELD.
ALFRED SCHRODER.
N. Y. FITZGERALD.
M. A. McNAMARA.

STATE OF NEBRASKA,
Douglas County, ss:

On this 28th day of September, A. D. 1885, before me a Notary Public duly commissioned and qualified within and for said Douglas County in the said State of Nebraska personally appeared the said J. C. Regan, J. E. Riley, J. W. Paddock, Geo. W. Duncan, George Canfield, Alfred Schroder, M. J. Fitzgerald and M. A. McNamara personally known to me to be the identical persons whose names are signed to the foregoing articles of incorporation and they all and each for himself acknowledged the signing and execution of the same to be his voluntary act and deed for the purposes therein set forth.

In Witness Whereof I have hereunto set my hand and Notarial Seal this the said 28th day of September, A. D. 1885.

[SEAL.]

J. T. MORIARITY,
Notary Public.

Recorded Sept. 28th, A. D. 1885 at 4½ o'clock P. M.

GUST BENEKE,
County Clerk.

STATE OF NEBRASKA,
Douglas County, ss:

I, D. M. Haverly, County Clerk in and for said State and County, do hereby certify that I have compared the above and foregoing copy of New Omaha Thompson-Houston Electric Light Company as it appears of Record in Book "B" of Incorporation Record on page 301 and the same is a true and correct copy thereof.

119 Witness my signature and the seal of said County at Omaha, this 4th day of September, A. D. 1908.

[SEAL.]

D. M. HAVERLY,
County Clerk,
By FRANK DEWEY,
Deputy.

Endorsed: Filed Sep. 29, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 28th day of September, 1908, Affidavit of Waldemar Michaelson was filed in said case, which said Affidavit is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Complainant,
vs.

THE CITY OF OMAHA and WALDEMAR MICHAELSON, Defendants.

Doc. "Y," Page 105.

Affidavit of Waldemar Michaelson.

STATE OF NEBRASKA,
Douglas County, ss:

Waldemar Michaelson, being first duly sworn, deposes and says: That he is an electrician, the City Electrician of the City of Omaha, and has been since January 5, 1904, and that he was graduated from the Polytechnical Institute, Copenhagen, Denmark, in the year 1890, and possesses technical knowledge with reference to electricity and the uses thereof for power, heat and lighting purposes. Affiant further states that the Omaha Electric Light & Power Company in

furnishing electricity to its patrons in the City of Omaha for heating and power purposes where electric currents are used to any considerable extent for heating and power, places a separate meter for the purpose of determining the amount of electricity used for heat and power purposes, as distinct from the amount used for lighting purposes; and that the said Omaha Electric Light & Power Company keeps a separate account of the amount of electric current so used for heat and power as distinct from the amount used for lighting purposes, wherever such electric currents are used for heat and power to any considerable extent.

Affiant further states that in 1885 and 1886, electricity was not used for heat and power purposes to any considerable or practicable extent, and that its use for such purposes was not sufficient to render it a merchantable or commercial commodity for those purposes, and electricity was not then recognized by persons familiar with its uses and possibilities as being practicable for heat and power purposes.

WALDEMAR MICHAELSON.

Subscribed in my presence and sworn to before me this 25 day of September, 1908.

[SEAL.]

JOHN A. RINE,
Notary Public.

Endorsed: Filed Sep. 28, 1908. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: At the September, 1908, Term of said Court, and on the 23rd day of December, 1908, the following proceedings were had and done in said case as appear of record in Journal No. "7" of the proceedings of said Court, to-wit:

OMAHA ELECTRIC LIGHT & POWER COMPANY

vs.

CITY OF OMAHA et al.

105 Y.

This cause coming on to be heard before the Court, the same is argued by the attorneys for the respective parties, and the argument not having been concluded at the hour of adjournment, it is

Ordered, That further proceedings herein be and they hereby are postponed until tomorrow morning at 9:30 o'clock.

Thereupon afterwards, to-wit: At the September 1908 Term of said Court, and on the 24th day of December, 1908, the following proceedings were had and done in said case as appear of record in Journal No. "7" of the proceedings of said Court, to-wit:

OMAHA ELECTRIC LIGHT & POWER COMPANY
vs.

CITY OF OMAHA et al.

105 Y.

This cause again came on to be heard, and the court having heard the remaining argument of counsel, the same is duly submitted and by the Court taken under advisement.

Thereupon afterwards, to-wit: On the 17th day of July, 1909, Memorandum Opinion was filed in said case, which said Memorandum Opinion is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

121 OMAHA ELECTRIC LIGHT & POWER COMPANY, Complainant,
vs.

THE CITY OF OMAHA and WALDEMAR MICHAELSON, Defendants.

Y 105.

Memorandum Opinion.

W. H. MUNGER, D. J.:

In 1884 the City of Omaha was a city of the first class, governed by a legislative charter which gave to the corporate authorities of the city full power, control and authority over the streets and alleys of the city. In December, 1884, the city council of said city passed an ordinance, which was duly approved by the Acting Mayor of the city, which ordinance gave to the New Omaha Thomson-Houston Electric Light Company, or assigns, the right to erect and maintain poles and wires, with all the appurtenances thereto, upon and over the streets, alleys and public grounds of said city "for the purpose of transacting a general electric light business," under such reasonable rules and regulations as might be provided by ordinance. The provisions of the ordinance were accepted by the New Omaha Thomson-Houston Electric Light Company, and an electric light plant established in the City of Omaha, the electrical current therefor being transmitted over wires strung upon poles erected upon the various streets and alleys within the city.

The application of electric power to stationary machinery was not much understood or developed in 1884, and for several years thereafter. As appliances were invented for such purposes they were used by said Electric Light Company.

Ordinances have subsequently been passed by the city of a general nature, requiring that all companies using or desiring to use electricity for light, power and heatin purposes should be governed by certain regulations under the direction of the City Electrician. A subsequent ordinance was passed, requiring all companies furnish-

ing electricity for lighting, heating and power purposes, to pay a certain percentage of gross receipts to the city. In 1903, shortly before the termination of the corporate existence of said New Omaha Thomson-Houston Electric Light Company, it assigned all its property, and rights acquired by virtue of said ordinance of 1884, to complainant, and for the years 1902, 1903, 1904, 1905 and 1906, complainant paid to the City Treasurer of the City of Omaha the percentage upon its gross receipts for electrical energy furnished by it for lighting and power purposes, and complainant and its predecessors have invested a large sum of money in producing the
122 electrical current for power and heat, in addition to what would have been required for lighting purposes only.

The city has also by ordinance required all companies transmitting electricity for heat, light and power purposes, to place within a certain prescribed district within the city all wires so used in conduits under the ground. In May, 1908, the city council by resolution approved by the mayor, directed the city electrician to disconnect, or cause to be disconnected, on or before July 1st, 1908, all wires leading from the conduits or poles of the Omaha Electric Light & Power Company, transmitting electricity to private persons or premises, to be used for heat or power, and to take such steps as would prevent said Omaha Electric Light & Power Company from furnishing or transmitting from the conduits or wires electricity to private persons or premises for heat or power purposes. The city electrician notified complainant of his purpose to carry out the provisions of said resolution. Thereupon complainant instituted this action to enjoin the city and said Michaelsen, as city electrician, from enforcing the provisions of said resolution, or otherwise interfering with complainant in its business of furnishing under the provisions of the ordinance of 1884, electricity for light, heat and power purposes.

There are no controverted questions of fact, the case presenting simply questions of law.

I think the city had authority, in 1884, under the general power given it over the streets and alleys within the city, to pass the ordinance in question, granting to the New Omaha Thomson-Houston Electric Light Company, the privilege given by said ordinance.

The privilege given by said ordinance not being exclusive was not a special privilege or immunity within the meaning of Section 15 of Article 3 of the Constitution of the State.

City of Plattsmouth vs. Nebraska Telephone Co., 80 Neb., 460; 114 N. W., 588.

Omaha Water Co. vs. City of Omaha, 147 Fed., 1; 77 C. C. A., 267.

Nor was the grant to the New Omaha Thomson-Houston Electric Light Company, or assigns, limited in duration to the corporate life of said company.

Detroit Citizens Street Ry. Co. vs. City of Detroit, 64 Fed., 628; 12 C. C. A., 363; 184 U. S., 368.

123 The ordinance of 1884 was limited in its terms to a "general electric light business, and did not grant to the company authority for the transmission of an electrical current for purposes other than lighting.

Chicago General Street Ry. Co. vs. Ellicott, 88 Fed., 941.

City of Toledo vs. Western Union Tel. Co., 107 U. S., 10.

See, also, Sec. 907, Vol. 3, Abbott on Municipal Corporations.

It is, however, urged on the part of complainant that the ordinance in question was a contract; that the parties, by their acts and conduct have construed the ordinance as giving such authority, and the construction so given by the parties should be adopted by the Court. The rule, however, I think, is well settled that the interpretation given contracts by parties as shown by their acts can only be considered when the contract is ambiguous and susceptible of different meanings.

Russell vs. Young, 94 Fed., 45, 36 C. C. A., 71.

R. R. Co. vs. Trimble, 10 Wall., 367-377.

Delaware Surety Co. vs. Metropolitan Trust Co., 146 Fed., 600.

The ordinance in question is not to my mind ambiguous, but plain and specific, limiting the grant to general electric light purposes. In construing contracts and ordinances of this nature the general rule is that they should be construed strictly in favor of the public, yet they should receive a just and rational interpretation, and the Court endeavor to ascertain from the language used the true intent and meaning of the parties. To do this we should place ourselves back to the time of the passage of the ordinance in question, consider the then conditions, and ascertain what the city council at that time intended, and give the ordinance that construction, and not such a construction as private interests may now desire, nor such as public interest, after the lapse of years may desire.

The evidence shows, as before stated, that, at the time the city council acted in 1884, the application of electric power to stationary machinery was not much understood or developed, and was not for several years thereafter.

I cannot think that, in granting in 1884 the right to transmit electricity through the streets and alleys of the city for general electric lighting purposes, it was in the mind of the city council or any of the parties, or that they for a moment contemplated or intended, that the ordinance in question granted the right to transmit an electric current for all purposes and uses to which the inventive

124 mind might in the future apply it, even though such new uses might be equally beneficial to the public. Had such been the intention the word "light" would have been omitted. The words "a general electric light business," as used in the ordinance, show clearly an intention to limit the use to which the electric current was to be applied.

No representations or conduct upon the part of the city are shown

which would constitute an estoppel. Whether the ordinance granted authority to transmit electricity for other than lighting purposes was as well known to complainant and its predecessor as to the city, and the essential elements to constitute estoppel are not shown.

Crary vs. Dye, 208 U. S., 515.

Nor do I think the payment by complainant, and the receipt by the city, of a percentage upon complainant's gross income, derived from the sale of electricity for power as well as lighting purposes, constitutes a valid ratification of the assumed authority of complainant. The law, I think, fundamental, that a power required to be given by a city by ordinance can only be modified or enlarged by ordinance. The payments made by complainant were merely voluntary payments, made with full knowledge of all facts and its legal rights, and upon no representations or conduct by the city which estops it from denying that complainant's rights are greater than those expressly stated in the ordinance of 1884.

The conclusion above reached renders it unnecessary to determine whether or not the ordinance of 1884, containing no time limit, constituted a perpetual, irrevocable contract, or, as said in *Boise City Artesian Hot & Cold Water Co. vs. Boise City*, 123 Fed., 232; 59 C. C. A., 236,—was a mere privilege revocable at will.

The case will be dismissed for want of equity.

That complainant may have ample time to protect its rights by an appeal, if it should so desire, the restraining order heretofore granted will remain in force, and the decree will not be formally entered until the 31st day of the present month.

Endorsed: Filed Jul. 17, 1909. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: At the April 1909 Term of said Court and on the 22nd day of July, 1909, the following Decree was signed and filed in said case, and duly entered of record in Journal No. "7" of the proceedings of said Court, to-wit:

125

No. 105.

OMAHA ELECTRIC LIGHT & POWER COMPANY

vs.

THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Docket "Y."

This cause came on to be heard at the Sept. 1908 term and was submitted by the parties on the merits and argued by counsel, and taken under advisement by the court; and now, on this 22nd day of July, A. D. 1909, upon consideration thereof, it is

Ordered, Adjudged and Decreed as follows, viz: That the complainant's bill of complaint be, and the same is, hereby dismissed for want of equity, and that the said complainant pay the costs herein, taxed at \$, and that execution issue therefor.

W. H. MUNGER, Judge.

Endorsed: Filed Jul. 22, 1909. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 22nd day of July, 1909, Petition for an Appeal and Assignment or Errors were filed in said case, which said Petition and Assignment of Errors are in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

OMAHA ELECTRIC LIGHT & POWER COMPANY

vs.

THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Dock. "Y," Page 105.

The Petition of Omaha Electric Light and Power Company for Allowance of an Appeal and Assignment of Errors.

To the Court:

Omaha Electric Light and Power Company, the plaintiff in the above entitled cause, now shows that by the final decree therein the court has adjudged and decreed that the Bill of Complaint be dismissed for want of equity, and that the plaintiff pay the costs; that said final decree is prejudicial and erroneous as follows, to-wit:

Assignment of Errors.

The Circuit Court erred in rendering a decree dismissing the Bill of Complaint for want of equity, because:

(1) The conclusion of the court set forth in its memorandum opinion that the ordinance of the City of Omaha, of December 16, 1884, granting a franchise to the plaintiff, as corrected and 126 re-enacted April 25, 1899, limits the rights and privileges granted to the transmission of electric current which shall be used by the consumer for the production of light, is contrary to the undisputed evidence and is erroneous in fact and in law.

(2) The conclusion of the Circuit Court, set forth in its memorandum opinion, that the construction given to the granting ordinance by the parties thereto, during a period of twenty-five years of amicable enforcement and performance is neither controlling nor material, is contrary to the undisputed evidence and erroneous in fact and in law.

(3) The conclusion of the Circuit Court, set forth in its memorandum opinion, that the defendant city is not estopped by its conduct as shown by the undisputed evidence, is erroneous in law.

(4) The Circuit Court erred in refusing to render a decree in favor of the plaintiff, as prayed in the bill and making the temporary injunction perpetual.

Wherefore plaintiff prays that an appeal be allowed with super-seedeas and for a citation.

OMAHA ELECTRIC LIGHT AND POWER COMPANY,

By WESTEL M. MORSMAN, *Its Solicitor.*

Endorsed: Filed Jul. 22, 1909. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: At the April 1909 Term of said Court, and on the 22nd day of July, 1909, the following Order Allowing Appeal was signed and filed in said case, and duly entered of record in Journal No. "7" of the proceedings of said Court, to-wit:

OMAHA ELECTRIC LIGHT AND POWER COMPANY
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. "Y," Page 105.

Order Allowing Appeal.

Now, on this 22nd day of July, 1909, on the petition of the plaintiff in the above entitled cause, it is

Ordered That an appeal be allowed and that the said appeal have the effect of a supersedeas, upon the filing of a bond with the
127 Clerk of this Court in the penal sum of Two Thousand Dollars, which said bond is this day approved by the Court.

By the Court:

W. H. MUNGER,
District Judge Presiding.

Endorsed: Filed Jul. 22, 1909. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 22nd day of July 1909, Supersedeas Bond was filed in said case, which said Supersedeas Bond is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

OMAHA ELECTRIC LIGHT AND POWER COMPANY
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. "Y," Page 105.

Supersedeas Bond.

Know All Men By These Presents:

That we, Omaha Electric Light and Power Company, a corporation, as principal, and Frederick A. Nash, of the County of Douglas and State of Nebraska, as surety, are jointly and severally held and firmly bound unto the City of Omaha and Waldemar Michaelson, and their successors, in the penal sum of Two Thousand Dollars, lawful money of the United States, well and truly to be paid. The condition of the foregoing obligation is such that:

Whereas, the above bounden, Omaha Electric Light and Power Company, has appealed from the decree and judgment of the Circuit Court of the United States for the District of Nebraska in a certain

cause therein pending, wherein the said Omaha Electric Light and Power Company is complainant, and the City of Omaha and Waldemar Michaelson are defendants, and wherein the said Circuit Court has rendered a decree dismissing the bill of complaint for want of equity, and adjudging that the said plaintiff pay the costs of said suit.

Now, Therefore, if the said Omaha Electric Light and Power Company, appellant in said cause, shall prosecute its said appeal to effect, and answer and pay all damages and costs if it fail to make good its plea, then this obligation to be null and void; but otherwise in full force and virtue.

128 Witness our hands the 22nd day of July, A. D. 1909.

OMAHA ELECTRIC LIGHT & POWER CO.,

By F. A. NASH, *President*.

FREDERICK A. NASH, *Surety*.

The foregoing bond and surety is approved:

W. H. MUNGER, *Judge*.

Endorsed: Filed Jul. 22, 1909. Geo. H. Thummel, Clerk.

Thereupon, afterwards, to-wit: On the 22nd day of July, 1909, a Citation was duly signed in said case, and returned and filed on the 23rd day of July, 1909, with acceptance of service endorsed thereon, the following of which is the original:

THE UNITED STATES OF AMERICA:

To the City of Omaha and Waldemar Michaelson, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, sixty days from and after the date this citation bears, and pursuant to an appeal allowed and filed in the Clerk's office of the Circuit Court of the United States, for the District of Nebraska, in said Eighth Circuit, wherein Omaha Electric Light and Power Company is appellant and you are appellees, to then show cause, if any there be, why the decree rendered against the said Omaha Electric Light and Power Company, as in said appeal mentioned, shall not be corrected and reversed, and why speedy justice shall not be done the parties in that behalf.

Witness the Honorable William H. Munger, presiding Judge of the said Circuit Court of the United States, for the District of Nebraska, this 22nd day of July, in the Year of Our Lord One Thousand Nine Hundred and Nine.

WM. H. MUNGER,

*Judge of the District Court of the United States
for the District of Nebraska.*

Due and legal service of the foregoing citation is acknowledged this 23rd day of July, A. D. 1909.

H. E. BURNAM,

*City Attorney and Solicitor for the City of Omaha
and Waldemar Michaelson.*

129 Doc. Y. Page 105. In the Circuit Court of the United States, within and for the District of Nebraska, Omaha Division. The Omaha Electric Light & Power Company vs. The City of Omaha and Waldemar Michaelson. Citation. Filed Jul- 23, 1909, A. D. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 23rd day of July, 1909 Præcipe for Transcript and Notice were filed in said case, which said Præcipe and Notice are in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

OMAHA ELECTRIC LIGHT AND POWER COMPANY
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. "Y," Page 105.

Præcipe for Transcript on Appeal.

To the Clerk of said Court:

Please make a transcript of the following parts of the record in the above entitled cause for appeal to the United States Circuit Court of Appeals, to-wit:

The Bill of Complaint.

The Restraining Order.

The Answer.

The Replication.

All evidence for Complainant, to-wit:

Deposition of Edward F. Schurig.

" " William F. White.

" " Henry A. Holdredge.

" " Samuel E. Schweitzer.

Ordinances numbered 826, 4569, 3391, 3791, 4366, 5433, 5051.

The assignment of franchises, etc.

All evidence for defendants, to-wit:

Articles of Incorporation of New Omaha Thomson-Houston Electric Light Company.

Deposition of Waldemar Michaelson.

Journal Entry of Submission.

Memorandum Opinion.

Final Decree dismissing the Bill.

Petition for Appeal and Assignment of Errors.

130 Order Allowing Appeal.

Supersedeas Bond.

The Citation.

This Præcipe and Notice.

WESTEL W. MORSMAN,
Solicitor for Plaintiff.

To the City of Omaha and Waldemar Michaelson:

Take notice that the appellant, Omaha Electric Light and Power Company, deems the above and foregoing parts of the record all that is necessary for the hearing of said cause on its appeal to the United States Circuit Court of Appeals.

W. W. MORSMAN,
*Solicitor for Omaha Electric Light
and Power Company.*

Service of the foregoing notice is acknowledged this 23rd day of July, A. D. 1909.

HARRY E. BURNAM,
*City Attorney and Solicitor for the City of
Omaha and Waldemar Michaelson.*

Endorsed: Filed Jul- 23, 1909, Geo. H. Thummel, Clerk.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States, for the District of Nebraska, hereby certify that pursuant to the Order of Court, and in compliance with the Præcipe, a copy of which is found on page 199 hereof, the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings, proceedings, depositions, documentary evidence and memorandum opinion of record, and on file in said Court as mentioned in said præcipe, and as indicated in the foregoing Index, and this transcript contains all of the evidence, towit: the depositions of Edward F. Schurig, Henry A. Holdrege, William F. White, and Samuel E. Schweitzer, and all exhibits thereto, Omaha City ordinances numbered 826, 4569, 3391, 3791, 4366, 5051, 5433, and assignment of franchises, for the plaintiff,—and the deposition of Waldemar Michaelson and Articles of Incorporation of New Omaha Thomson-Houston Electric Light Company, for the defendants, which was produced and submitted on the trial of said cause, in the case of Omaha Electric Light and Power Company, vs. The City of Omaha, et al., No. 105, Docket "Y," and that a copy
131 of the Citation, duly certified, has been lodged and remains in my said office as such Clerk.

Witness my hand and the seal of said Court at Omaha in said District this 30th day of July, A. D. 1909.

[Seal U. S. Circuit Court, District of Nebraska, Omaha Division.]

GEO. H. THUMMEL, *Clerk.*

Filed Aug. 31, 1909, John D. Jordan, Clerk.

132 (*Appearance of Mr. Westel W. Morsman as Counsel for Appellant.*)

On the thirty-first day of August, A. D. 1909, the appearance of Mr. Westel W. Morsman, as counsel for appellant, was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSEN, Appellees.

Appeal from the Circuit Court for the District of Nebraska.

Precipe for Appearance.

To the Clerk of said court:

Please enter my appearance as counsel for Omaha Electric Light and Power Company in the above entitled cause.

WESTEL W. MORSMAN,
*Counsel for Appellant, Omaha Electric
Light and Power Company.*

(Endorsed:) No. 3141. In the United States Circuit Court of Appeals, for the Eighth Judicial Circuit. Omaha Electric Light and Power Company, Appellant, vs. The City of Omaha and Waldermar Michaelsen, Appellees. Precipe for Appearance. Filed Aug. 31, 1909, John D. Jordan, Clerk. Westel W. Morsman, Counsel for Appellant.

(*Appearance of Mr. Harry E. Burnam et al. as Counsel for the Appellees.*)

And on the eleventh day of October, A. D. 1909, the appearance of Mr. Harry E. Burnam, et al., as counsel for the appellees, was filed in said cause, in the words and figures following, to-wit:

133 United States Circuit Court of Appeals, Eighth Circuit.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,
vs.
CITY OF OMAHA et al.

The Clerk will enter my appearance as Counsel for the Appellees.

HARRY E. BURNAM.
I. J. DUNN.
JNO. A. RINE.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3141. Omaha Electric Light and Power Company, Appellant, vs. City of Omaha, et al. Appearance. Filed Oct. 11, 1909, John D. Jordan, Clerk. Harry E. Burnam, I. J. Dunn, John A. Rine, Counsel for Appellees.

(Argument Commenced.)

And on the eleventh day of January, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

TUESDAY, January 11, 1910.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,
vs.

CITY OF OMAHA et al.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Westel W. Morsman in behalf of the appellant, but the hour for adjournment having arrived before the conclusion thereof, the further hearing of this cause was postponed until tomorrow.

134

(Order of Submission.)

And on the twelfth day of January, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

WEDNESDAY, January 12, 1910.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,
vs.

CITY OF OMAHA et al.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause having been called this day for further hearing, argument was continued by Mr. Westel W. Morsman for the appellant

and by Mr. I. J. Dunn and Mr. Harry E. Burnam for the appellees and concluded by Mr. Westel W. Morsman for the appellant.

Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the twentieth day of April, A. D. 1910, an opinion of said United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

135 United States Circuit Court of Appeals, Eighth Circuit,
December Term, A. D. 1909.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,
vs.
CITY OF OMAHA et al., Appellees.

Appeal from the Circuit Court of the United States for the District
of Nebraska.

Mr. Westel W. Morsman for appellant.

Mr. Harry E. Burnam and Mr. I. J. Dunn for appellees.

Before Sanborn and Adams, Circuit Judges.

ADAMS, Circuit Judge, delivered the opinion of the court:

The Electric Light Company had been carrying on the business which its name indicates in the City of Omaha for some twenty-five years when in May, 1908, by a concurrent resolution of the City Council the electrician of the City was directed to disconnect the wires of the Company so as to prevent their use for the transmission of electric current for heat or power. To enjoin that threatened action was the purpose of this suit, which was instituted by the Company against the City and its electrician, Michaelson. The Circuit Court refused to issue the injunctive order and on final hearing dismissed the bill. The Company appeals.

On December 16, 1884, the City passed an ordinance known as No. 826, as follows: "Be it ordained by the City Council of the City of Omaha: Section 1. That the New Omaha-Thomson-Houston Electric Light Company, or assigns, is hereby granted the right of way for erection and maintenance of poles and wires, with all the appurtenances thereto, for the purpose of transacting a general electric light business through, upon and over the streets, alleys and public grounds of the City of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance." * * * "Provided Further, that whenever the City Council shall, by ordinance,

declare the necessity of removing from the public streets and alleys of the City of Omaha the telegraph, telephone or electric poles
136 or wires thereon constructed or existing, said Company shall, within sixty (60) days from the passage of such ordinance remove all poles and wires from such streets and alleys by it constructed, used or operated."

At the time this ordinance was passed the Electric Light Company referred to therein had not been incorporated.

It was, however, understood that it should be and it subsequently was incorporated pursuant to that understanding for a term of twenty years to expire September 26, 1895. The Company being then an incorporated body of limited life tenure, accepted the ordinance as passed and thereby entered into contract relations with the City. These facts estop both parties from denying that there was a corporation in existence at the time the contract was formally concluded or that such corporation was one of limited life tenure. The Company afterwards proceeded to construct a plant and machinery for generating electric current with a system of poles and wires in the streets and alleys for its transmission and distribution throughout the City and maintained the same continuously until July 29, 1903, when its corporate life being about to expire by limitation it sold and transferred its property and franchises to the complainant Omaha Electric Light and Power Company. The latter named Company continued the business of its predecessor without interruption until May, 1908, when the following concurrent resolution was adopted: "Resolved, by the City Council of the City of Omaha, the Mayor concurring, that the City Electrician be, and he is hereby ordered and directed to disconnect, or cause to be disconnected, on or before July 1st, 1908, all wires leading from the conduits or poles of the Omaha Electric Light and Power Company transmitting electricity to private persons or premises to be used for heat or power; and to take such steps as may be necessary to prevent the said Omaha Electric Light and Power Company from furnishing or transmitting from the conduits or wires, electricity to private persons or premises for heat or power purposes." * * *

The City was about to carry this resolution into effect when the bill in the case was filed. On the hearing of an application for a temporary restraining order the cause was by agreement submitted on the merits for a final decree.

The complainant claimed that because its grant from the City was absolute in form, containing no limitation upon its duration, it constituted a grant in perpetuity entitling it and its successors or assigns to use the streets forever for the distribution of its electric current. The City claimed (1) that it was without power to grant a perpetual franchise and (2) that if it had the power it did not exercise it but at best conferred upon the Company a license to occupy its streets revocable at the will of the City at least after the expiration of the corporate life of the Company.

The joint resolution of May, 1908, disclosed the intention on the part of the City to prevent the Company from using its streets
137 for transmitting electricity for heat or power purposes only. The claim was that the ordinance in terms granted the right

of way for the purpose of transacting "a general electric light business" only and that furnishing either heat or power was not comprehended within the terms of the grant.

The court below adopted the theory that the ordinance in granting the right to transact "a general electric light business" necessarily limited the right of the Company thereunder to use the streets to carry on a lighting business only and did not confer upon it the right to use them for any other branch of business.

It was argued in opposition, among other things, that the words "general electric light business" are of such uncertain and ambiguous import as to permit elucidation by the practical construction placed upon them by the parties and that as so constructed they comprehended the business of transmitting electric current for heat and power as well as light.

Many facts called to our attention by learned counsel for complainant indicate that the City allowed the Company to invest large sums of money in preparing for this extended service; knew it was about to enter upon it and that it was continuing in it and not only did not object but received pecuniary emoluments therefor.

Such being the case, the argument at the bar was extended beyond the limited inquiry made by the trial court. It was addressed to the fundamental questions, whether the City had the power to grant a perpetual franchise, and if so whether it had in fact done so. As these questions necessarily include the less important one actually decided below, we will confine ourselves to them.

Undoubtedly the ordinance granted to the Company either (1) a franchise to use the streets of the City perpetually, (2) a franchise to use them for a reasonable time, the same to be determined in view of all the facts and circumstances, or (3) a license revocable at the will of the City at any time. Which of these is correct?

The City contends it cannot be construed as a perpetual franchise because that would violate the prohibition of Art. I, Sec. 16 of the Constitution of Nebraska which ordains that "no" * * * "law" * * * "making any irrevocable grant of special privileges or immunities" * * * "shall be passed."

The Company contends that the grant of a perpetual franchise which confers no exclusive right to the grantee is not the grant of a special privilege or immunity within the meaning of the Constitution and relies upon *Plattsmouth v. Nebraska Telephone Co.*, 80 Neb. 460, 464; *Omaha Water Co. v. City of Omaha*, 77 C. C. A. 267, 272, 147 Fed. 1, and cases there cited.

This contention of the Company might be conceded and the question would not be settled.

138 The legislature of the State which primarily had the authority to grant the use of streets for other than the ordinary purposes of travel, could have exercised its authority by direct legislation or through the instrumentality of the City in which the streets were situated.

In *Wright v. Nagle*, 101 U. S. 791, the question related to the grant of a franchise to maintain a toll-bridge. The Supreme

Court there said: "A grant of this franchise from the public in some form is therefore necessary to enable an individual to establish and maintain a toll-bridge for public travel. The legislature of the State alone has authority to make such a grant. It may exercise this authority by direct legislation, or through agencies duly established, having power for that purpose. The grant when made binds the public, and is, directly or indirectly, the act of the State. The easement is a legislative grant, whether made directly by the legislature itself, or by any one of its properly constituted instrumentalities." See to the same effect *City Railway Co. v. Citizens' Railroad Co.*, 166 U. S. 557, 563.

The mayor and council, therefore, in making the contract evidenced by ordinance 826 were exercising a delegated authority. The State by act of its legislature approved February 21, 1883 (laws of 1883, p. 90), empowered the mayor and council of each city to pass any and all ordinances not repugnant to the Constitution and laws of the State; * * * "to provide for the lighting of the streets" * * * "to care for and control" * * * "streets, avenues, parks and squares within the City" and by act of its legislature approved March 3, 1885, before acceptance by the Company of the grant in question (laws of 1885, Chap. 13, p. 117), it again empowered them "to provide for the lighting of streets, laying down of gas pipes and erection of lamp-posts, and to regulate the sale and use of gas and electric lights, the charge for electric light and the rent of gas-meters within the City, and to require the removal from the streets, avenues and alleys, and the placing on the ground of all telegraph, electric and telephone wires."

Legislative grants of power to municipal corporations must be strictly construed, and cannot operate as a surrender of legislative power except so far as expressly delegated or is indispensably necessary to the exercise of some other power which has been expressly delegated. *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 59 C. C. A. 236, 123 Fed. 232; *City of Detroit v. Detroit City Ry. Co.*, 56 Fed. 867, 876; *Turnpike Co. v. Illinois*, 96 U. S. 63; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 696; *Citizens' St. Railway v. Detroit Railway*, 171 U. S. 48; *Water, Light & Gas Co. v. City of Hutchinson*, 207 U. S., 385; *Lancaster County v. Green*, 54 Neb. 98.

Applying this rule to the present case we are of opinion that the conference of power in general terms to "provide for lighting the streets" or "to care for and control the streets" is not
139 specific enough to warrant a grant by the city to a business corporation of the right to use the streets of the city forever for the purpose of conducting a general lighting business. That is a servitude not embraced within the ordinary control over streets usually given to municipalities.

A perpetual franchise even if not exclusive in fact becomes largely so by the advantage in the race which preoccupation of the field and perpetual right to continue in it afford. And while it may not be technically obnoxious to the Constitutional prohibition against

"granting special privileges or immunities" it is so unusual and extraordinary as to require, in our opinion, a more specific legislative authorization than the general language relied on by the Company therefor.

We therefore conclude that even if the mayor and council had intended to grant a perpetual franchise to the Company they were powerless to do so.

This conclusion might put an end to further discussion but another proposition was argued before us which brings us to the same result. The ordinance when taken as a whole and construed in the light of what was expressed as well as unexpressed in it and in view of all the attending facts and circumstances, discloses, we think, a clear purpose not to grant a perpetual franchise.

The right to use the streets of the City forever to inaugurate and promote a private enterprise would seem to have been so important and valuable a feature of the contract as to irresistably lead the contracting parties to mention it specifically if they intended to provide for it and not leave its existence dependent upon implication.

The ordinance actually reserved to the City the right to require the removal of the poles and wires from the streets within sixty days after the City Council should declare the necessity therefor by ordinance. This is not only inconsistent with but it seems quite repugnant to the claim of perpetuity now made by the Company.

On the other hand the cost and expense of installing and maintaining an electric lighting system was so great as to render it unlikely that the Company would embark upon it without assurance of some reasonable term of enjoyment.

Moreover, the fact that the Company was permitted without let or hindrance to continue its business for the full period of twenty years indicates a mutual understanding that some substantial term of enjoyment was contemplated. That was a practical construction placed upon a contract of dubious meaning which, according to well recognized law, should receive due consideration at the hands of the court.

In view of the foregoing, disclosing that no perpetual franchise was intended and pointing to the improbability of the Company embarking upon the business without some assurance of extended enjoyment, we think the fact that the corporate life of the Company continued for a period of twenty years affords a key to the true intention of the parties.

It is improbable that the mayor and city council with due regard to the rights of the inhabitants of the city would tie their own hands as well as that of all future councils and mayors by granting a perpetual franchise to a Company whose corporate life rendered it certain that it could not discharge its duties more than twenty years and with no obligation upon it at the end of its life to assign its rights to another person or corporation empowered or obligated to accept the grant and perform the desired service.

In *Turnpike Co., v. Illinois* (supra) the Supreme Court of the United States in considering whether the grant of a given franchise

was in perpetuity or not made use of the following language: "No term was expressed for the enjoyment of this privilege; and no conditions were imposed for resuming or revoking it on the part of the State. It cannot be presumed that it was intended to be a perpetual grant, for the Company itself had but a limited period of existence. At common law, a grant to a natural person, without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. But by analogy to this, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation." * * * "Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public."

In *Wyandotte Electric Light Co. v. City of Wyandotte*, 124 Mich. 43, the Supreme Court of Michigan considered an application to restrain interference with poles and wires of an electric light company and said: "If a railroad company were organized for a period of thirty years, and a party, natural or corporate, should grant it a right of way without specifying the time of user, the grant would be for the lifetime of the corporation. The law would imply that both parties contracted with reference to its period of existence. The same rule is applicable here." Citing *Turnpike Co. v. Illinois* (supra). To the same effect are *Blair v. Chicago*, 201 U. S. 400, 481; *City of Rock Island v. Central U. Tel. Co.*, 132 Ill. App., 248; *Virginia Canon Toll Road Co. v. The People*, 22 Colo. 429.

We think the facts of this case, in the light of the foregoing authorities, disclose the intention that the company should have and enjoy the franchise in question at least for the period of its corporate existence and that its assigns or successors might thereafter hold and enjoy the same at the will of the City only.

141 This conclusion reconciles many if not all of the apparent inconsistencies of the situation and is not in disharmony with the principle declared in *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 395, and *State ex rel. City of St. Louis v. Laclede Gas-light Co.*, 102 Mo. 472, that a corporation whose corporate existence was limited to a term of years could accept a grant or make a contract extending beyond the limit of its corporate life.

The question here is not whether a lawful contract could be made for a term extending beyond the corporate life of the Company but relates to the probative force which limited life tenure among other facts and circumstances has in construing a contract of uncertain and ambiguous character like that under consideration.

It follows that the Electric Light and Power Company at the time of the threatened removal of its equipment by the city was occupying the streets as a licensee at the will of the city.

Without passing on the question whether the grant of a franchise to use streets for "an electric light business" is sufficiently comprehensive to include the right to use them for the purpose of transmitting electric current for heat and power purposes, we think the decree dismissing the bill was correct on the ground that the fran-

chise to use the streets for any purpose had expired before this suit was brought. The decree below is accordingly.

Affirmed.

Filed April 20, 1910.

142

(Decree.)

And on the twentieth day of April, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

WEDNESDAY, April 20, 1910.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,
vs.
CITY OF OMAHA AND WALDEMAR MICHAELSON.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that the City of Omaha and Waldemar Michaelson have and recover against the Omaha Electric Light and Power Company the sum of twenty dollars for their costs herein and have execution therefor.

April 20, 1910.

(Petition of Appellant for a Rehearing.)

And on the nineteenth day of May, A. D. 1910, a petition of the appellant for a rehearing was filed in said cause, in the words and figures following, to-wit:

143 United States Circuit Court of Appeals, Eighth Circuit.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,
vs.
CITY OF OMAHA et al., Appellees.

Petition for Rehearing.

To the Judges of said Court:

Your Petitioner, Omaha Electric Light and Power Company, a corporation, complainant below and appellant in this Court, shows that an opinion was filed in said cause on the 20th day of April, 1910, and it was ordered and adjudged by the Court that the decree of the Circuit Court dismissing your Petitioner's bill of complaint be affirmed with costs, and your petitioner avers that there are manifest and material errors in said opinion, but for which the Court could not have rendered said judgment, and which, if corrected, will require the said judgment to be vacated, and your Petitioner, therefore, brings this petition for a rehearing in said cause for the reasons and grounds following:

144

I.

Conceding the correctness of Your Honors' conclusion that the franchise in question was not perpetual; that it was for a term of twenty years and thereafter at the will of the city, nevertheless complainant is entitled to the relief prayed.

First. The decision disregards the contract right of your petitioner even on the theory that it is now operating "at the will of the city."

The granting ordinance contains this provision:

"Provided further, that whenever the City Council shall by ordinance declare the necessity of removing from the public streets and alleys of the City of Omaha the telegraph, telephone or electric light poles or wires thereon constructed or existing, said Company shall, within sixty days from the passage of such ordinance, remove all poles and wires from such streets and alleys by it constructed, used or operated."

In the opinion Your Honors hold that this provision is inconsistent with the existence of a perpetual franchise; that "on the other hand, the cost and expense of installing and maintaining an electric light system was so great as to render it unlikely that the Company would embark upon it without assurance of some reasonable term of enjoyment;" consequently, that the intention was "that the Company should have and enjoy the franchise in question at least for the period of its corporate existence" and then "at the will of the City." In Your Honors' opinion the provision above quoted could

not have been intended to be applicable during "the reasonable term of enjoyment" which is held to be twenty years, consequently it necessarily becomes operative at the expiration of that term when, in Your Honors' opinion, the complainant became a licensee operating "at the will of the City."

145 This proviso, thus construed by this Court, in conformity with the contention of the City in its printed argument and at the bar, is a plain and simple agreement that the grantee shall continue in the enjoyment of its rights and privileges at the will of the City until the City Council shall declare by ordinance that the necessity exists as stated in the proviso. It prescribes the conditions upon and the manner in which the City can and must exercise its "will" to determine the franchise after the expiration of the "substantial" and minimum term which, the opinion holds, the parties contracted with reference to. The reservation in the City of the right to terminate complainant's rights and privileges by ordinance declaring the necessity therefor, is, as a matter of law, an agreement that the company shall continue to operate until a public necessity actually exists and has been declared, and as this proviso is now construed it is not only not inconsistent with perpetuity, but it shows, clearly, an intention to create an easement in perpetuity—subject to be defeated or terminated only upon the happening of the public necessity and a declaration of its existence by ordinance. The City cannot arbitrarily and out of mere whim or caprice fulfill the obligations of this contract by declaring a necessity which does not exist and for which no reasonable justification can be given. Until such necessity shall have arisen the City is powerless to proceed.

The City never has, in fact, by ordinance declared the necessity of removing the poles or wires of complainant. There is no
146 pretense of any compliance with this plain, mandatory requirement of the granting ordinance which constitutes the contract between the parties.

The above principles would be applicable and the injunction should issue even if the granting ordinance contained no such provision.

Levis vs. City of Newton, et al., (75 Fed., 884), is a case entirely analogous in principle to the present case.

The City of Newton, in the year 1887, by ordinance, granted to H. M. Vaughn and his assigns the right to place poles and wires upon the City streets for the transmission of electric energy and provided that the rights and privileges granted should be "permanent and perpetual." In conformity therewith an electric light plant was constructed and placed in operation. Several assignments of the property rights and franchises were made and an incumbrance placed upon the property, of which the plaintiff was the owner. In 1896 the City Council of Newton passed an ordinance providing:

"That it shall be the duty of every person or corporation now maintaining poles in the streets and alleys of the city of Newton, and claiming to have erected the same under the said Ordinance No. 129, to remove the same from the said streets and alleys within ninety days after this ordinance shall take effect."

In overruling a demurrer to a bill filed to enjoin the enforcement of this ordinance the Circuit Court found it unnecessary to determine the validity of the perpetual feature of the original granting ordinance, but held that, assuming (but not deciding) the invalidity of that provision, the remainder of the ordinance would nevertheless be valid and the complainant was held to be entitled to the relief prayed. The case is therefore entirely similar to the one at bar except that no question as to a franchise for a twenty
147 year period or for any definite period was involved. In other words, the franchise was assumed by the Court to be in effect at the will of the City of Newton. The Court says:

"This last named ordinance announces no reasons for such repeal, and no good reasons are shown why such repeal, effecting such serious injury to, and substantially destroying, plaintiff's security, is necessary or proper. The controlling motives which caused its enactment are only left to be inferred from the allegations of the bill. We may not deny to the city whatever supervision and control belong to it in the complete and legitimate exercise of its police powers. It is not necessary at this time to attempt to define the extent of such supervision and control. But the words of the supreme court of Iowa in *City of Burlington vs. Burlington St. Ry. Co.*, supra, are pertinent to the case, as thus far presented: 'This police authority is not a despotic power that may be exercised without a sufficient public purpose.' Having arrived at the conclusion that the city had the power to grant the authority conferred in Ordinance No. 129, to use its streets, this necessitates the holding that such ordinance granted more than a mere license for said use."

Second. The decision disregards the equitable rights of your petitioner even on the theory that it is now operating "at the will of the city."

Irrespective of the above provision of the granting ordinance the defendant City is estopped from arbitrarily terminating Petitioner's business and destroying its property, even though Petitioner be merely operating at the will of the City. The defendant City, by its ordinances and contracts and by the acts of its officials, has constantly dealt with and acted toward your Petitioner in such a manner as to necessarily imply an intention to permit your Petitioner to
148 exercise its rights for a reasonably extended period of time in the future. Your Petitioner, acting under and in conformity with the provisions of such ordinances, requirements and express and implied declarations of the defendant City and its officers, has, in consequence thereof, expended large sums of money in preparing itself to adequately serve the defendant City and the public during such reasonably extended period in the future.

The defendant City, on the 8th of March, 1902 (within three years of the time of expiration of the twenty-year term determined by Your Honors), passed an ordinance requiring your Petitioner to build underground conduits and put its wires and cables therein (Record, 111) and on December 20th, 1904, (within nine months of the time of the expiration of said twenty-year term) the defendant City passed an amended ordinance making further provision for

the placing underground of your Petitioner's said wires and cables. (Record, 112.) This action on the part of the City could only have been with the understanding and expectation that your Petitioner should reasonably and for an adequate future period of time continue to operate its business, even though it should be doing so, technically, at the will of the City. In conformity with the requirements of these ordinances, your Petitioner, at an expense of over \$400,000 (Record, 45), built conduits and placed its wires and cables underground, and this with the knowledge, both actual and constructive, of the defendant City. A large part of this expenditure was made subsequent to the actual date of expiration of the twenty-year term.

On the 12th day of April, 1905 (after the expiration of the twenty-year term aforesaid and while Petitioner was, under the decision of this Court, operating "at the will of the City"), the defendant City entered into a written contract with Petitioner for the furnishing

by Petitioner of electric light for the streets, alleys, public
149 grounds and buildings of the defendant City for a period terminating December 31, 1909. (Record, 15, 28.) This contract was in full force and effect at the time the defendant City, on May 26th, 1908, passed the concurrent resolution requiring the City Electrician to cut the wires of your Petitioner, the execution of which is sought to be enjoined by the present suit. It is not possible that after the defendant City had entered into this contract, by the terms of which Petitioner was compelled to continue the operation of its business at least until December 31st, 1909, that nevertheless, before the expiration of the term of such contract the defendant City would be entitled to destroy the wires and terminate the business of Petitioner.

Since the expiration of the twenty-year term so found by Your Honors the defendant City has furthermore demanded and collected from Petitioner large sums as taxes and royalties and has repeatedly and up to the time of the institution of this action passed numerous ordinances regulating and providing for the future conduct of the business of Petitioner and has constantly, through its officers, supervised and superintended the establishment of improvements in machinery and appliances of Petitioner's plant and the extension of the conduits, cables, wires and service to be furnished by your Petitioner and has constantly so conducted itself toward Petitioner as to indicate a purpose and intention on the part of the defendant City to permit and require the operation of your Petitioner's plant and the furnishing by your Petitioner of the public service in which it has been engaged, for a reasonable and adequate period of time in the future.

Your Petitioner, in reliance on the aforesaid ordinances, contracts, regulations, requirements and supervision of the defendant
150 City and its officers, has paid out and expended large sums of money, amounting in the aggregate to more than \$1,000,-
000 since the year 1903 (Record, 45) in purchasing and installing new and improved machinery and extending its mains, cables and wires so as to be in a position to adequately provide the defendant City and the using public with necessary current for light, power

and heat. Petitioner has expended a total sum exceeding \$2,500,000 in establishing its said plant. Petitioner has furnished good, adequate and satisfactory service to the defendant City and to the using public and at reasonable and satisfactory rates and has in all things fulfilled the duties and obligations resting upon it as a public service corporation and as provided for in the aforesaid ordinances, contracts, regulations and requirements of the defendant City and its officers.

We respectfully submit that the decree now rendered by Your Honors must result in grave injustice to your Petitioner through a failure to apply to the undisputed facts of this case the established principles of equitable estoppel.

We quote in this connection the language of his Honor, Judge Sanborn, in *Illinois Trust & Savings Bank vs. City of Arkansas*, (76 Fed., 271):

"There is another and a conclusive reason why this City cannot maintain any of the defences it has interposed in this suit. * * * No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. * * *

In a business transaction like that of procuring the construction of waterworks and the use of water for itself and its inhabitants, a municipality is subject to this principle to the same extent
151 as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations." (Citing many authorities).

Third. The decision fails to protect the rights of the public now being served by your petitioner as a public service corporation.

The record discloses that practically the only source from which the inhabitants of the City of Omaha can secure electric current for light and power is from your Petitioner (Record, 39, 46); that some 2,500 patrons in said City, including grain elevators, grist mills, passenger elevators and every variety of stationery machinery are now being served with electric current for power by your Petitioner (Record, 38); that these consumers have, in many instances, incurred large expense in the acquiring of motors, machinery and buildings equipped for the use of such electric current for power and heat and all this with the knowledge and acquiescence of the defendant City and its officers, who have issued permits for and have inspected installations made with that sole end in view. (Record, 47.)

Under the decision rendered by Your Honors, if the defendant City is entitled to cut the wires furnishing electric current for power and heat it would be equally entitled to cut the wires furnishing electric current for lighting.

Your Petitioner is the only source from which the entire population of the City of Omaha and South Omaha and the adjacent suburbs can by any possibility secure electric current for lighting, and

152 the only source from which the City of Omaha, the City of South Omaha and the adjacent suburbs can secure electric current for the lighting of the streets, alleys and public grounds and buildings.

Your Honors have in your charge not only the rights of the defendant City and the rights of your Petitioner, but also the rights of the general public, whose interest it is the sole duty of the defendant City to protect and whose proper and adequate service it is the business of your Petitioner, as a public service corporation, to subserve. If the decision now rendered by Your Honors is permitted to stand the defendant City will be authorized and empowered to cut the wires of your Petitioner furnishing power and heat to its 2,500 patrons and thereby seriously interfere with and in many instances entirely destroy the business of that large number of the inhabitants of the City; and also to cut the wires of your Petitioner furnishing current for lighting, thereby causing great and incalculable inconvenience and damage to the public.

Power in the City to terminate the franchise at will cannot be exercised by the destruction of the Company's property and business and the property, business and convenience of the public.

All powers of a City must be exercised for the benefit of the public.

The franchise was not derived from the City. It belonged to and was derived from the State. The State authorized the City to grant it for the public welfare, and, in the exercise of a broad power, the City could limit the term; but the State did not grant to the City, and the City could not take to itself by reservation in the grant, or otherwise, power to adjudge and determine its own rights and proceed to execute its judgment by the destruction of property and by depriving the public of the service which the State intended to secure to it.

153 It was held by the Supreme Court of Nebraska, in *Nebraska Telephone Co. vs. City of Fremont*, 72 Neb., 25, 31 (a very similar case):

"The Fremont telephone system is not an unlawful structure but a public work of great utility. The plaintiff, if in unlawful possession, to the detriment of the public may be ousted by appropriate judicial proceedings, but private rights and public interests alike forbid wanton destruction of the property."

An action by the State, in quo warranto, is the only remedy for the alleged usurpation of such franchises. The claim by the City that it had legally determined the franchise by the concurrent resolution directing the destruction of the wires is no defense to this suit.

Nebraska Telephone Co. vs. City of Fremont, supra.

Iron Mountain Ry. Co. vs. City of Memphis, 96 Fed. 113, 123.

II.

The opinion is erroneous in holding that the parties intended, the City to grant and the Company to accept, a franchise for the minimum term of 20 years and thereafter at the will of the city.

This conclusion is not predicated upon any fact tending to show an expressed intention to limit the grant to a term of 20 years.

The granting ordinance was framed and passed about one year before the Company was organized, and there is no fact in the record tending to show that the City had or acted upon any knowledge that the Company would be incorporated, or that the incorporators then knew they would incorporate, for the period of twenty years.

The grant is to the grantee and its assigns, without restriction. These are clear and express words of perpetuity. Their meaning and legal effect, in a grant, are not debatable. It was impossible to have expressed an intention to create a perpetual easement in more explicit and certain words. They comprehend, not merely a single person, but a line or succession of persons, in perpetuity—or until succession fails.

Ogden vs. Price, 9 N. J., Law 169.

Bennington Iron Co. vs. Rutherford, 18 N. J., Law 164.

Cumberland vs. Graves, 7 N. Y., 311.

These express, controlling and unmistakable words of the grant are completely nullified by the opinion.

Again, in 1902 the City passed Ordinance No. 5051 (Record, p. 109) mandatorily requiring the grantee to put its wires underground on or before May 1, 1903; and, in 1904 (one year before the expiration of the minimum term) Ordinance No. 5433, (Record, p. 111), enlarging the period for compliance to October 1, 1905, (the time when the minimum term would expire), and the grantee and the appellant expended, in compliance with this requirement, more than \$400,000. Municipal corporations do not always observe the highest standards of business integrity, but it is impossible to believe that the City of Omaha would have committed this monstrous wrong, or that the Companies would have voluntarily submitted to it, if it had been supposed by either that the franchise had expired or would immediately expire and that the City would be at liberty to determine all rights under it.

All controlling facts, we respectfully submit, are ignored by this opinion and the conclusion of the Court that the parties intended to limit the grant to a term of 20 years, is rested upon two propositions, only, viz: (1) That by the terms of the grant the City reserved the right to terminate it, by ordinance (which has not been done) declaring a necessity for removing the poles and wires (which has not been claimed to exist), a proposition which, in division I of this petition, has been shown to defeat the conclusion that the rights of the company had expired before the commencement of this suit; and (2) That the right to use streets "forever," for the operation of a "private" business, was so "im-

portant and valuable" a feature of the contract that the parties would have provided for it "specifically" if they had intended, one to grant and the other to secure it.

It has already been pointed out that the parties did provide for it specifically, by annexing words of perpetuity to the grant—words extending the grant until succession should fail.

But, from what source did the Court obtain information to warrant the conclusion that the perpetual feature was so "important and valuable"? There was no averment, no evidence, nor any contention, that, at the time of the grant, it was of any value whatever. The subject was not discussed in any form. We think it perfectly fair to assert that, at the time of this grant, it was as uncertain and speculative, whether the grant, or its perpetual feature, or the business conducted under it would be of any importance or value, or not, as any purchase of property or business venture can ever be. What the Court assumes to be now true, was, at the time of the grant, unknown and unknowable. If it be conceded that the feature of perpetuity is now valuable, it is due to the expenditure of
 156 large sums of money, wise management and the assumption of great risks, new inventions, and the growth of the City to which the continuous service of the company has largely contributed.

As the city has full power to regulate the business of the company and none of its powers are surrendered or suspended by a grant which is not exclusive, no valid reason can possibly be given for the claim that a perpetual grant is inimical to public interest, and none has yet been attempted, excepting the advantage of predatory power to make a new contract—with the company deprived of all freedom of contract. But this sentiment rests upon widespread demoralization which complacently talks of "public rights" while seeking to confiscate the vested rights and property of the company—confiscation which is no less real and certain because it is mild in degree.

It is said in the opinion that a perpetual franchise, "even if not exclusive in fact, becomes largely so by reason of the advantage in the race which preoccupation of the field and perpetual right to continue in it afford." But this is merely an advantage which arises out of an established business and has no relation whatever to a right which excludes the City from constructing its own system and from granting a franchise to other private corporations, thereby surrendering or suspending the sovereign power delegated to the City. It is in no sense an impairment of the powers of the City. In the City of Lincoln and, at least one other city, in Nebraska, there are two private corporations, each exercising independent franchises to distribute and sell electricity, in addition to which, in each case, the City owns and operates its own system, and dual systems are not uncommon throughout the country.

It is inaccurate and misleading to speak of the business to be conducted under this grant as a "private" business. If it
 157 was a purely private business it could not be carried on in the public ways. It is the performance of a public service, a

service which the City, in its organized character, should itself have performed if it had not found it to its advantage to secure the performance by the Company, and which it may now perform when performance by the Company ceases to be advantageous.

We submit that the Court has predicated its conclusion upon this important question, involving large pecuniary interests, upon a proposition of fact, which was not alleged or proved, upon which no hearing has been had, and which is probably immaterial. This Court does not, of course, assume the duty or profess to have the power, to correct mere evils, or what is popularly supposed to be an evil. But we respectfully think that the popular conviction that, in Cities as large as Omaha, indeterminate franchises of this character are disadvantageous to the public (a conviction which we think is seriously debatable) has, unconsciously, diverted the deliberations of the Court and betrayed it into plain error.

III.

The opinion is erroneous in holding that the City had no power, under the grant of powers from the State, to grant a perpetual franchise.

(1) The opinion treats this question as if the powers granted by the State to the City were limited to the "ordinary control" over streets usually given to municipalities. It is said that a perpetual grant is "a servitude not embraced within the ordinary control over streets usually given to municipalities." The grant of powers to the City was:

158 Power to pass any and all ordinances not repugnant to the constitution and laws of the State.

Power to "care for and control" and to "vacate" or "narrow" streets, avenues and alleys.

Power to "provide" for the lighting of streets, and the erection of lamp posts.

Power to "regulate" the "sale and use" of electric lights, the "charge" for electric light.

Power to require electric wires to be removed from the surface of the streets and placed underground.

As, in the express grants of power, the legislature specifically provided for "care and control," it is obvious that, by the other, equally specific and comprehensive, grants of power, it intended to enlarge the powers of the City and to invest the City with discretion limited only by good faith, public welfare, the constitution and laws of the State, and reasonableness in the exercise of the power to "regulate." There can be no other limitation to what the City might have done in the exercise of these powers. But the opinion of the Court, notwithstanding it briefly refers to some of these powers, gives no consideration or weight to them and completely nullifies them by holding that under the limited power to control the streets, the City could not grant a perpetual franchise, or, in this case, a franchise to the grantee and its assigns.

(2) It is further said in the opinion, in support of this conclusion, that a perpetual franchise "is" (that is, at the present day) so "unusual and extraordinary" that a more specific legislative authorization than the terms in which these powers were granted was necessary to invest the City with power to grant a perpetual franchise

159 We submit that, if the Court, by construction based upon alleged conditions, establishes a limitation of the broad and comprehensive words in which these powers were granted to the City, it should only consider conditions existing at the time the powers were delegated, and not those which exist at the present day. If it be said that we are attaching too much importance to the tense of the expression, then we further submit that the Court has no power to find, as a fact of which it may take judicial knowledge, that, in 1884, in Nebraska, a perpetual franchise of this character was "unusual and extraordinary." We believe this is not true in point of fact.

We are not aware of an exclusive municipal franchise having ever been granted in the state; but we believe that, generally, municipal franchises have been intended, and believed by the parties, to be perpetual, excepting those granted within a recent period. The supreme Court of the State has, in a case where the grant was clearly less explicit than in the case at bar, said:

"By the terms of the ordinance, there was a grant to the association, in perpetuity, of a right of way or easement over all its public ways, without restriction or limitation."

Nebraska Telephone Co. vs. City of Fremont, 72 Neb. 25, 29.

(3) It is further said in the opinion that these delegations of powers to the City must be strictly construed. But we again submit that no construction, however strict, of the broad and comprehensive words in which the powers are delegated, can raise any distinction whatever between a limited and a perpetual (but not exclusive) grant. That the State could have given the power to the City to grant an unlimited term, is not questioned, and the

160 words are so entirely unrestricted, so broad and comprehensive, that they must be superceded in order to raise such a distinction.

IV.

The opinion is erroneous because it fails to give due weight to subsequent acts of the legislature equivalent to ratification of the power actually exercised by the city.

This subject is not considered in the opinion and (we concede) if the opinion is sound in holding that the ordinance discloses a clear purpose not to grant a perpetual franchise, it was unnecessary to consider it. But so far as the conclusion of the Court rests upon a want of power in the City, ratification, by subsequent acts of the legislature, is as important in determining the scope of the powers delegated to the City as the original act of delegation.

The argument for appellant on this branch of the case, and the subsequent acts of the legislature, are found in the printed brief commencing at page 99.

And upon the foregoing grounds the appellant prays that a rehearing be granted and that the judgment of the Court be vacated.

LUDOWICK F. CROFOOT,

EDGAR H. SCOTT,

Solicitors for Appellant.

I certify that the foregoing petition is presented in sincerity and good faith and, in my opinion, is well grounded in law.

WESTEL W. MORSMAN,

Counsel for Appellant.

(Endorsed:) Filed May 19, 1910. John D. Jordan, Clerk.

161

(Order Denying Petition for Rehearing.)

And on the thirteenth day of October, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for a rehearing, in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1910.

THURSDAY, October 13, 1910.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,

vs.

THE CITY OF OMAHA et al.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for the appellant.

On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

October 13, 1910.

(Motion for Order Staying Mandate.)

And on the nineteenth day of October, A. D. 1910, a motion for stay of the mandate was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON, Appellees.

Motion to Stay Mandate.

The Appellant, Omaha Electric Light and Power Company, now shows to the Court:

162 That it desires to present to the Court, or to one of the Judges thereof, a petition for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, and that it will, within twenty days, or such time as may be considered reasonable by the Court, perfect its appeal as provided by law.

Wherefore, the Appellant moves the Court that the Mandate be stayed for the period of twenty days in order that Appellant may perfect such appeal.

Dated at Omaha, Nebraska, October 18th, 1910.

WESTEL W. MORSMAN,
EDGAR H. SCOTT,
LODOWICK F. CROFOOT,
Sol's for Appellants.

(Endorsed): United States Circuit Court of Appeals, Eighth Circuit. No. 3141. Omaha Electric Light and Power Company, Appellant, vs. The City of Omaha and Waldemar Michaelson, Appellees. Motion to stay Mandate. Filed Oct. 19, 1910, John D. Jordan, Clerk.

(Order Staying Issuance of Mandate.)

And on the nineteenth day of October, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order staying the issuance of the Mandate in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1910.

WEDNESDAY, October 19, 1910.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER Co., Appellant,

vs.

CITY OF OMAHA et al.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Upon consideration of the motion of the appellant for an order staying the issuance of a mandate in this cause, pending the presentation to this Court of a petition for the allowance of an appeal to the Supreme Court of the United States, it is now here ordered by this Court that the mandate herein be, and is hereby,
163 stayed for a period of twenty days from and after this date.

(*Appearance of Mr. Edgar H. Scott and Mr. Lodowick F. Crofoot, Counsel for Appellant.*)

And on the twenty-first day of October, A. D. 1910, the appearance of Mr. Edgar H. Scott and Mr. Lodowick F. Crofoot, as counsel for the appellant, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY,

vs.

THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Præcipe for Appearance.

To the Clerk of said Court:

Please enter our appearance in the above entitled cause as of counsel for Omaha Electric Light and Power Company.

EDGAR H. SCOTT.

LODOWICK F. CROFOOT.

(Endorsed): United States Circuit Court of Appeals, Eighth Circuit. No. 3141. *Præcipe for Appearance.* Omaha Electric Light and Power Company, vs. The City of Omaha and Waldemar Michaelson. Filed Oct. 21, 1910. John D. Jordan, Clerk. Edgar H. Scott and Lodowick F. Crofoot, Omaha, Neb., Counsel for Appellant.

(Petition for Appeal and Assignment of Errors.)

And on the twenty-first day of October, A. D. 1910, a petition for appeal to the Supreme Court of the United States and assignment of errors was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

No. 3141.

164 OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON, Appellees.

Petition for the Allowance of an Appeal. Specification of Errors.

To the Hon. the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Your Petitioner, Omaha Electric Light and Power Company, Appellant in the above entitled cause, now shows to the Court:

(1) That the above entitled cause is a suit in equity, instituted by your Petitioner, as complainant, in the Circuit Court of the United States for the District of Nebraska, wherein your petitioner by its bill of complaint prayed for a decree and an injunction restraining the defendants The City of Omaha and Waldemar Michaelson from forcibly cutting, removing or otherwise severing or disconnecting the electric wire conductors, or any wire conductors, or in any manner whatever interfering with such conductors or any other structure, apparatus or device, belonging to your petitioner and maintained in the streets and public ways of the City of Omaha so as to stop or impede your petitioner in its business of transmitting, distributing and selling electric current to and for the use of the inhabitants of the City of Omaha for the production of heat and power.

(2) That your petitioner claimed, by its bill of complaint, the right to maintain its wires and apparatus in the streets and public ways of the defendant City by virtue of an ordinance-contract and franchise, passed and enacted with full power under a general law of the State of Nebraska, granting to New Omaha Thomson-Houston Electric Light Company (and to your petitioner as its assignee and successor) the right to so occupy the streets and public ways of the defendant in the manner and for the purpose aforesaid in perpetuity, which contract had been accepted and performed by your petitioner and its assignor; and that the defendant, City, had, by its Mayor and council, passed a concurrent resolution, legislative in its character and effect, empowering and commanding the defendant, Michaelson, who is the city electrician of said city, to cut and disconnect all of your petitioner's wire con-

18—162

ductors employed in the transmission of electric current to persons and corporations who would employ the same in the production of heat or power and to continuously prevent the transmission of such electric current to persons who would so employ it and that the defendants were about to enforce such resolution by force, all of which facts were established without controversy.

(3) That the jurisdiction of the Circuit Court was, by the averments of the bill of complaint, invoked upon the grounds (1) of diverse citizenship, and (2) upon the ground that the concurrent Resolution passed by the Mayor and Council of said City was a law of the State impairing the obligation of the ordinance-contract aforesaid, and (3) that the threatened action of the defendants deprived your petitioner of its property without due process of law; and your petitioner avers that the record presents a cause in which the jurisdiction does not depend entirely upon diverse citizenship, and the said cause is one in which the decree of this Court is not final, in which the matter in controversy exceeds One Thousand Dollars besides costs, and in which an appeal of right is guaranteed by the Act of Congress of March 3d, 1891, establishing Circuit Courts of Appeals etc.

(4) That the Circuit Court for the District of Nebraska rendered a final decree dismissing the bill of complaint and adjudging your petitioner to pay the costs, from which decree your petitioner appealed to this Court and this Court has now rendered its final decree affirming the decree of the Circuit Court and adjudging your petitioner to pay the costs of appeal.

Specification of Errors.

And your petitioner avers that there is manifest error on the face of the record, that is to say:

1. The Circuit Court of Appeals erred in holding and deciding that "even if the Mayor and Council had intended to grant a perpetual franchise to the company, they were powerless to do so."

166 2. The Circuit Court of Appeals erred in deciding and holding that the ordinance-contract granting to New Omaha Thomson-Houston Electric Light Company, and its assigns, the franchise to occupy the streets and public ways, must be limited to the term of twenty (20) years (the term for which the grantee was incorporated under a general law of the State, after the passage of the granting ordinance) and that, "its assigns or successors might thereafter hold and enjoy the same at the will of the City only."

3. The Circuit Court of Appeals erred in rendering a decree affirming the decree of the Circuit Court.

Wherefore, your petitioner prays that an appeal to operate as a supersedeas, be allowed; that the supersedeas bond herewith presented be approved and that a citation be signed, to the end that the record and said cause may be removed to and reviewed by the Supreme Court of the United States and that justice may be done.

LODOWICK F. CROFOOT,
EDGAR H. SCOTT, AND
WESTEL W. MORSMAN,
Sol's for Appellant.

The within assignment of errors was presented to and examined by me this 21st day of October, 1910, before allowing the appeal.

WALTER H. SANBORN,
Presiding Judge.

(Endorsed): United States Circuit Court of Appeals, Eighth Circuit. No. 3141. Omaha Electric Light and Power Company, Appellant, vs. The City of Omaha and Waldemar Michaelson, Appellees. Petition for the allowance of an Appeal and Specification of Errors. Filed Oct. 21, 1910, John D. Jordan, Clerk.

(Order Allowing Appeal to Supreme Court U. S.)

And on the twenty-first day of October, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order allowing an appeal in said cause, in the words and figures following, to-wit:

167 United States Circuit Court of Appeals, Eighth Circuit, September Term, 1910.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY
vs.
THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Order Allowing Appeal.

FRIDAY, October 21, 1910.

On presentation of the petition of Omaha Electric Light and Power Company praying the allowance of an appeal in the above entitled cause, in open Court, it is ordered that the same be granted and that the appeal be allowed to operate as a supersedeas upon giving security as provided by law.

October 21, 1910.

(Supersedeas Bond on Appeal to Supreme Court U. S.)

And on the twenty-first day of October, A. D. 1910, a supersedeas bond on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY

vs.

THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Supersedeas Bond.

Know all men by these presents:

That Omaha Electric Light and Power Company, a corporation, as principal, and F. A. Nash, as surety, are, jointly and severally held and bound unto the City of Omaha and Waldemar Michaelson in the penal sum of Two Thousand Dollars lawful money of the United States, for the payment of which we bind ourselves, our successors and representatives firmly by these presents.

The condition of the foregoing obligation is such that, whereas, the above bounden Omaha Electric Light and Power Company is about to appeal from the decree of the United States Circuit
168 Court of Appeals, rendered in the above entitled cause, to the Supreme Court of the United States.

Now therefore, if the said Omaha Electric Light and Power Company shall prosecute its appeal with effect and answer and pay all damages and costs awarded against it if it fail to make good its appeal, then this obligation shall be null and void but otherwise in full force and virtue.

Signed this 19th day of October, 1910.

OMAHA ELECTRIC LIGHT AND
POWER COMPANY,

By F. A. NASH, *Pres't.*

F. A. NASH, *Surety.*

The foregoing bond is approved this 21st day of October, 1910.

WALTER H. SANBORN,

Judge of the United States

Circuit Court of Appeals.

I am acquainted with F. A. Nash, surety in the foregoing bond and consider the bond perfectly good in that respect.

W. H. MUNGER.

(Endorsed): United States Circuit Court of Appeals. Eighth Circuit. No. 3141. Omaha Electric Light and Power Company, vs. The City of Omaha and Waldemar Michaelson. Supersedeas Bond. Filed Oct. 21, 1910, John D. Jordan, Clerk.

(Citation on Appeal to Supreme Court U. S.)

And on the twenty-fourth day of October, A. D. 1910, a citation on appeal to the Supreme Court of the United States was filed in said cause, the original of which with acknowledgment of service endorsed thereon is hereto attached and herewith returned:

169 United States Circuit Court of Appeals, Eighth Circuit.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY

vs.

THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Citation.

To the City of Omaha and Waldemar Michaelson:

You and each of you are hereby cited and admonished to appear in the Supreme Court of the United States at Washington, D. C. thirty days from and after the day this Citation bears date pursuant to an appeal allowed and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit wherein Omaha Electric Light and Power Company is Appellant and you are Appellees, to show cause, if any there be, why the decree rendered against Omaha Electric Light and Power Company, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness Walter H. Sanborn, presiding judge of said Court the 21st day of October, 1910.

WALTER H. SANBORN,
Presiding Judge.

Due and legal service of the foregoing citation and copy thereof is acknowledged this 22 day of October 1910.

HARRY E. BURNAM,
I. J. DUNN,
*Solicitor- for the City of Omaha
and Waldemar Michaelson, Appellees.*

Return to Jordan at St. Louis.†

170 [Endorsed:] United States Circuit Court of Appeals, Eighth District. No. 3141. Omaha Electric Light and Power Company vs. The City of Omaha and Waldemar Michaelson. Citation. Filed Oct. 24, 1910. John D. Jordan, Clerk.

[† In pencil in copy.]

171

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein the Omaha Electric Light and Power Company is Appellant and the City of Omaha and Waldemar Michaelson are Appellees, No. 3141, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-sixth day of October, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 22,378. U. S. Circuit Court Appeals, 8th Circuit. Term No. 162. Omaha Electric Light and Power Company, Appellant, vs. The City of Omaha and Waldemar Michaelson. Filed November 3d, 1910. File No. 22,378.

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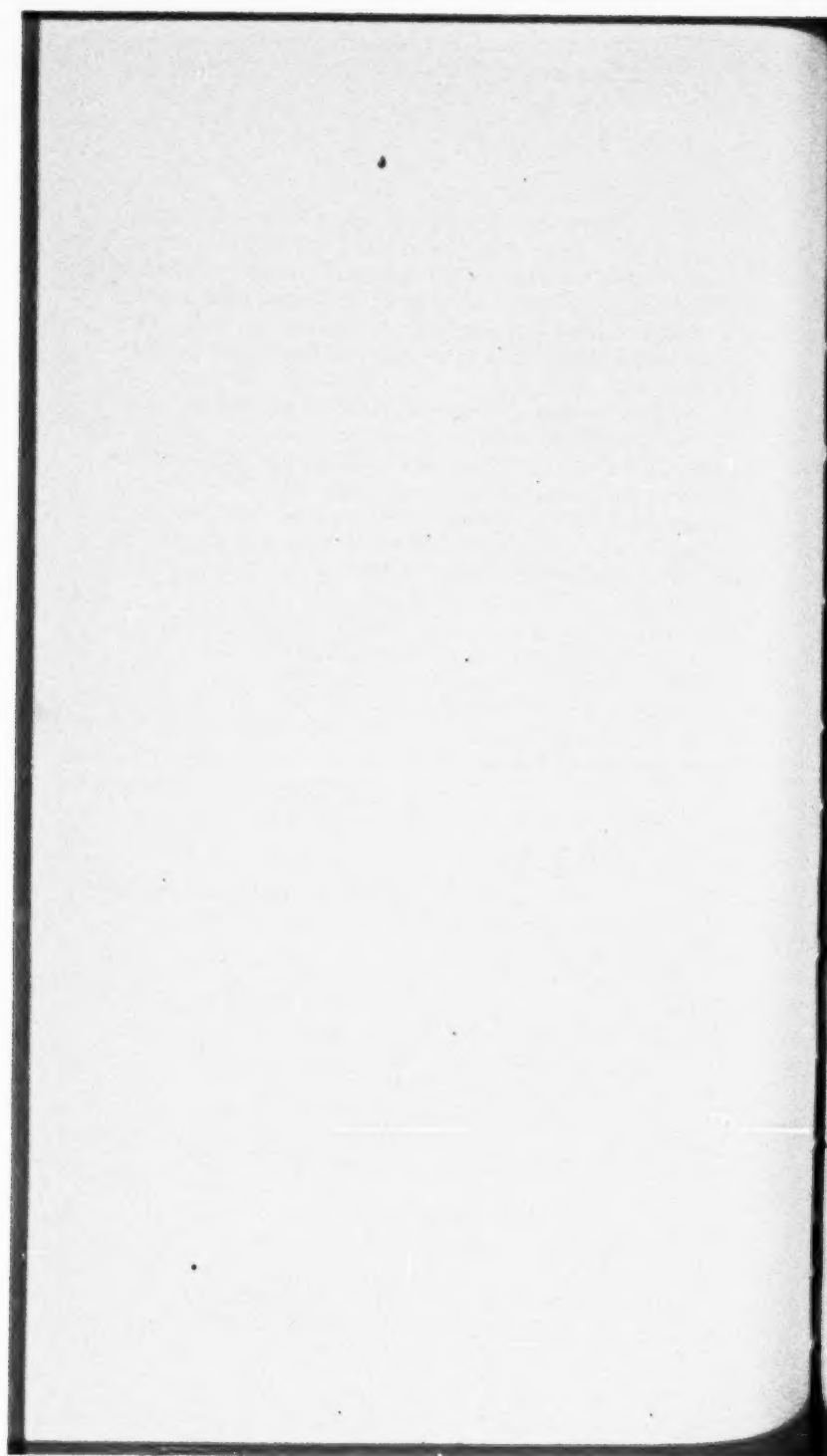
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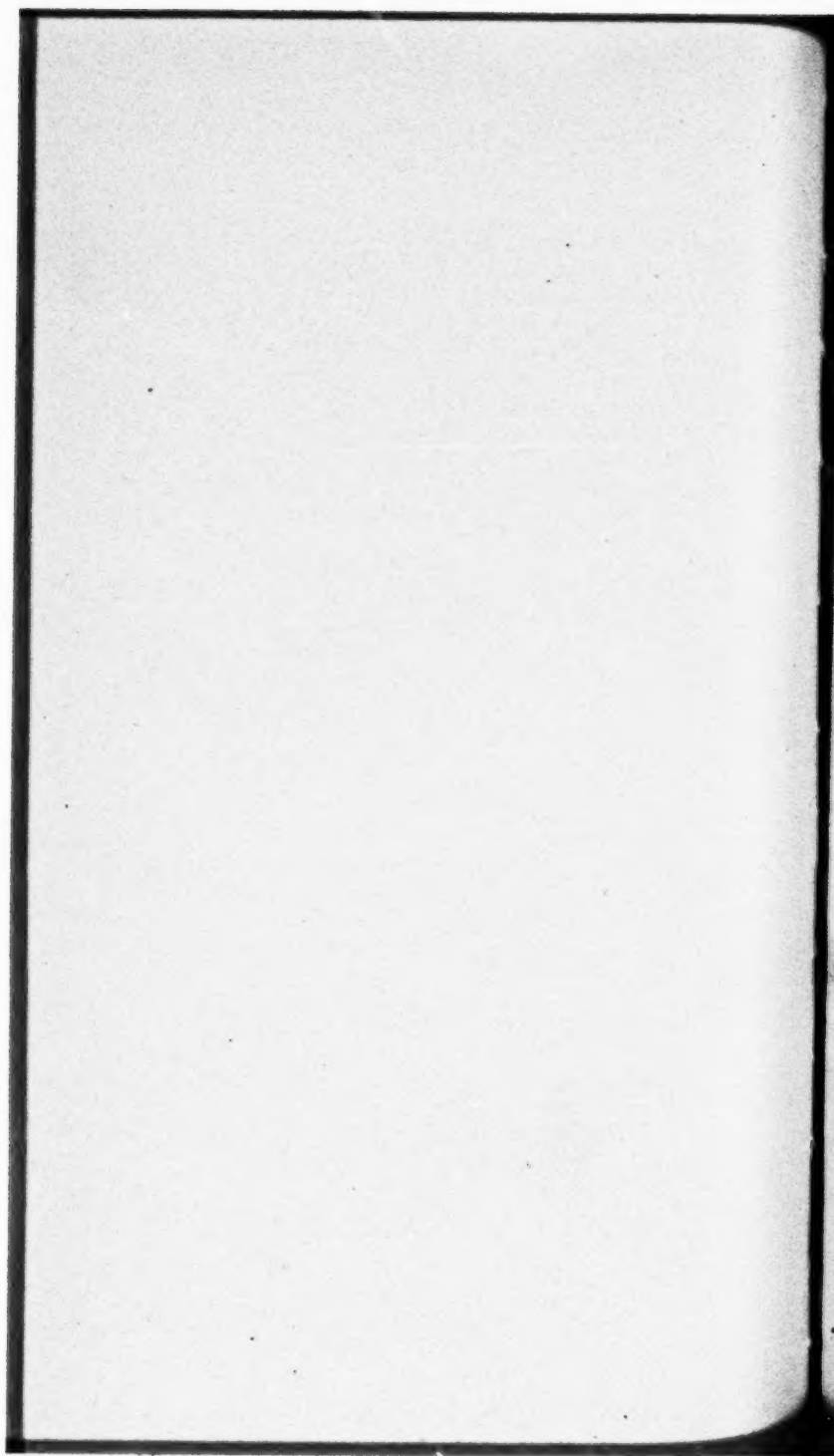


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In the Supreme Court of the United States

OMAHA ELECTRIC LIGHT AND POWER CO.

APPELLANT.

vs.

**THE CITY OF OMAHA AND
WALDEMAR MICHAELSEN**

APPELLEES.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT.

This action was instituted by the appellant in the Circuit Court of the United States for the District of Nebraska, to enjoin the defendant city from carrying out its declared purpose of cutting and removing from the streets and alleys of the city all of the cables and wires of the appellant company used for the transmission to its patrons of electric current for the development of heat or power.

The appellant claims to be possessed of a right of way and franchise over the streets and alleys of the defendant city for the placing and use of its poles, wires and cables for the transmission of electric current for the development of light, heat and power as assignee and successor in interest of the New Omaha Thomson-Houston Electric Light Company, to which latter com-

pany such right of way and franchise was granted in the year 1884 by ordinance, numbered 826:

“An Ordinance granting right of way to the Omaha New Thomson & Houston Electric Light Co., and regulating the same, and prescribing penalties for the violation of this ordinance.

Be it Ordained by the Mayor and Council of the City of Omaha, Nebraska:

SECTION ONE. That the Omaha New Thomson & Houston Electric Light Company, or assigns, is hereby granted right of way for erection and maintenance of poles and wires with all the appurtenances thereto, for the purpose of transacting a general electric light business, through, upon and over the streets and alleys and public grounds of the City of Omaha, Neb., under such reasonable regulations as may be provided by ordinance. Provided, that said company shall at all times when so requested by city authorities, permit their poles and fixtures to be used for the purpose of placing and maintaining thereon any wires which may be necessary for the use of the police or fire department of the city, and further provided, such poles and wires shall be erected so as not to interfere with ordinary travel through such streets and alleys, and provided, whenever it shall be necessary for any person to move along or across any of said streets or alleys any vehicle or structure of such height or size as to interfere with any poles or wires so erected, the company using and operating such poles and wires shall upon receiving twelve (12) hours' notice, thereof, temporarily remove such poles and wires from such place as must necessarily be crossed by such vehicle

or structure. And provided further that whenever the City Council shall by ordinance declare the necessity of removing from the public streets or alleys of the City of Omaha, the telegraph, telephone or electric poles, or wires thereon constructed or existing, said company shall, within sixty days from the passage of such ordinance, remove all poles and wires from said streets and alleys by it constructed, used or operated.

SECTION TWO. Any person who shall interfere, cut, injure, remove, break, or destroy any of the poles, wires, fixtures, instruments or other property of the Omaha New Thomson & Houston Electric Light Company, or association within the corporate limits of this city, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum, not exceeding One Hundred Dollars (\$100.00).

SECTION THREE. This ordinance shall take effect and be in force from and after its passage and approval." (Record p. 56.)

The New Omaha Thomson-Houston Electric Light Company had not been actually organized at the time of the passage and approval of that ordinance, but was incorporated in September, 1885. (Record p. 101.) It so happened that in drafting the articles of incorporation of the New Omaha Thomson-Houston Electric Light Company, it was provided that the corporation should continue for a period of twenty years. There is nothing in the record to indicate that the period of the existence of the company thus provided for in the articles had been thought of or determined upon until the organization of the company in September, or was in any way referred

to or considered at the time of the passage of the granting ordinance above set forth.

The New Omaha Thomson-Houston Electric Light Company accepted the grant from the defendant city and proceeded with the construction and equipment of a plant with all of the necessary poles, wires, cables, machinery and apparatus for conducting a general electric light business and from that time on, has continuously prosecuted that business and has furnished electric current to all of the inhabitants of the defendant city who required the same for light, heat or power. The present appellant, the Omaha Electric Light & Power Company, in the year 1903 succeeded to all of the franchises, rights and privileges of the New Omaha Thomson-Houston Electric Light Company. This company and its predecessor in interest had expended at the time of the institution of this action more than two and one-half million dollars in the establishment, development and extension of said plant (Record p. 40) and during all of the times intervening since the passage of the granting ordinance, have been the only concerns that were ever granted a right or franchise to conduct such a business in the City of Omaha, and the only concerns that have, in fact, carried on such a business with the single exception of the Omaha & Council Bluffs Street Railway Company, which, without any direct authorization from the city by ordinance or contract, has undertaken to furnish to certain of its patrons a limited quantity of electric current to be used for heat and power purposes. (Record p. 31-34.)

During the period since the organization of the New Omaha Thomson-Houston Electric Light Company, the defendant city has passed many ordinances requiring

persons and corporations using the streets, alleys and public places of the city for the distribution of electric current to comply with numerous regulations as to the erection and placing of poles, wires, cables and appliances and subjecting said companies to the orders of the city electrician, and providing numerous and specific rules for the supervision and control of the business so conducted by the appellant company and its predecessor, and requiring the securing of numerous permits by the company in the conduct of said business and the placing of the poles, wires, cables, apparatus and appliances used in the conduct thereof, all of which ordinances and the provisions and regulations thereof could have no application to any company or person except the appellant company and its predecessor in interest, with the possible exception of the Street Railway Company as to its comparatively unimportant business in furnishing current for heat and power as above stated. (Record p. 23, 30, 34, 38, 59 to 98.)

In December, 1904, the defendant city passed an ordinance, amendatory of a prior ordinance, requiring all persons and companies owning, maintaining and operating electric wires used for the transmission of electric current for the development of light, heat and power, to place all wires and cables in underground conduits within a certain prescribed business district. This ordinance had reference solely to the appellant company which complied with the requirements of the ordinance at a cost to it of more than \$400,000. (Record p. 40.)

In the year 1900 the defendant city entered into a written contract with the New Omaha Thomson-Houston Electric Light Company whereby that company was required for a period of five years to furnish to the city

not less than 600 arc lights for street lighting and to furnish certain lights in the public buildings of defendant city for said period, and to that end was required to place and maintain under the direction of the city and its officers, the necessary poles, wires, cables and conduits to enable it to carry out the terms of that contract, and in the year 1905 a new contract of similar import was entered into covering the period to December 31, 1909, which contract was in full force and effect at the time of the institution of this action.

For many years the city has collected from the appellant company and its predecessor in interest, a sum equal to 3% of the gross receipts of the company from its lighting and power business done within the city, under the terms of the contracts for public lighting to which reference has just been made. Payments so made to the city have been in constantly increasing amounts; the payment for the year 1902 being \$5,683.90 and for the year 1907—which was the payment last made prior to the institution of this action—\$13,458.33. (Record 44-48.)

During all of the time intervening between the passage of the granting ordinance in the year 1884 and the passage of the concurrent resolution, hereafter referred to, in May, 1908, neither the defendant city nor its officers or representatives had ever claimed that the appellant company or its predecessor in interest was not possessed of a perpetual right of way over the streets and alleys of the defendant city for the placing of poles, wires, cables and conduits and for the conduct of a general electric light business, including the furnishing of electric current to the inhabitants of the city for light, heat and power. On the contrary, the city by its acts and

conduct had uniformly and continuously given practical construction to the terms of said granting ordinance inconsistent with the denial of the possession by the Electric Light Company of such a franchise, and by a long continued and uninterrupted course of conduct, the city had induced the expenditure by said companies of great sums of money in reliance on the possession of such a franchise; expenditures that could not have been reasonably demanded by the city or complied with by the company on any other theory.

It will be admitted that the appellant company and its predecessor in interest have always furnished good, adequate and satisfactory service; that it has in all respects fulfilled the letter and spirit of its contract, and has performed every duty that might be claimed to devolve upon it, not only under the terms of the original granting ordinance, but under the requirements of all subsequent ordinances, and no objection has ever been made by the city to the character of the service rendered by the company as a public service corporation.

On the 26th day of May, 1908, the Mayor and City Council of defendant city passed the following concurrent resolution (No. 2330):

“Resolved by the City Council of the City of Omaha, the Mayor concurring, that the City Electrician be and he is hereby ordered and directed to disconnect, or cause to be disconnected, on or before July 1st, 1908, all wires leading from the conduits or poles of the Omaha Electric Light and Power Company, transmitting electricity to private persons or premises to be used for heat or power; and to take such steps as may be necessary to prevent the said Omaha Electric Light and Power Company from furnishing or transmitting from the conduits or wires electricity to private persons or premises for

heat or power purposes; and be it further resolved, by the City Council of the City of Omaha, the Mayor concurring, that the electrician be and is hereby ordered and directed to remove or cause to be removed on or before July 1st, 1908, all conduits, wires and poles belonging to the Omaha and Council Bluffs Street Railway Company and located in, under, upon or over, any street, alley, thoroughfare, or public place of the City of Omaha and maintained and used by said Street Railway Company for furnishing or transmitting electricity to private parties or premises for light, heat or power purposes." (Record p. 8.)

This action was instituted to enjoin the enforcement of the provisions of that concurrent resolution and the consequent destruction of the property of the Electric Light Company. On the application for the injunction in the Circuit Court the action was, by agreement, submitted on the merits for a final decree.

The Circuit Court held that the city had authority in 1884, under the general power given it over streets and alleys, to pass the ordinance in question granting the franchise and right of way therein designated; that the franchise thus granted was not exclusive and hence not a special privilege or immunity within the meaning of Section 16 of Article 1, of the State Constitution; and that the grant to the Electric Light Company, or its assigns, was not limited in duration to the corporate life of the company. But the Court held that the term "general electric light business" did not include the furnishing of electric current for heat or power, and for that reason entered a decree dismissing the bill for want of equity.

On an appeal by the Electric Light Company to the Court of Appeals of the Eighth Circuit, the decree of

the lower court was affirmed, but on entirely different grounds from those set forth in the opinion of the lower court. The Appellate Court held that the city was without authority to grant a perpetual franchise; that, consequently, the grant to the Electric Light Company was only for a reasonable period; that inasmuch as the corporation to which the franchise was granted subsequently adopted Articles of Incorporation providing that the corporate life of the company should be twenty years, it would be presumed that this period was in the minds of the parties at the time of the enactment of the ordinance, and would, therefore, constitute the "reasonable time" of the grant; and that since the expiration of that twenty-year period the company had been acting as a mere licensee at the will of the city.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding and deciding that "even if the Mayor and Council had intended to grant a perpetual franchise to the company, they were powerless to do so."

2. The Circuit Court of Appeals erred in deciding and holding that the ordinance-contract granting to New Omaha Thomson-Houston Electric Light Company, and its assigns, the franchise to occupy the streets and public ways, must be limited to the term of twenty (20) years (the term for which the grantee was incorporated under a general law of the state, *after the passage of the granting ordinance*) and that "its assigns or successors might thereafter hold and enjoy the same at the will of the city only."

3. The Circuit Court of Appeals erred in rendering a decree affirming the decree of the Circuit Court.

ARGUMENT.

I.

THE CITY OF OMAHA WAS AUTHORIZED TO AND DID GRANT TO THE ELECTRIC LIGHT COMPANY A PERPETUAL RIGHT OF WAY OVER THE CITY STREETS.

The Circuit Court of Appeals based its decree primarily upon the proposition that the Mayor and City Council of the City of Omaha could not grant a perpetual franchise for the reason that no such legislative authorization had been given.

This is a question as to the proper construction of the legislative enactments governing the authority of the city. In determining the question the Court of Appeals not only went counter to the prevailing authorities, and, as we believe, to sound reasoning, but entirely overlooked the contrary construction that had been placed upon these statutes (or upon others practically identical in terms) by the Supreme Court of Nebraska.

THE SUPREME COURT OF THE STATE OF NEBRASKA HAS REPEATEDLY CONSTRUED PROVISIONS SUBSTANTIALLY IDENTICAL WITH THOSE UNDER WHICH THE MAYOR AND CITY COUNCIL OF THE CITY OF OMAHA ENACTED ORDINANCE NO. 826 AND HAS UNIFORMLY HELD THAT A MUNICIPALITY IS THEREBY AUTHORIZED TO GRANT AN IRREVOCABLE FRANCHISE TO USE THE STREETS AND ALLEYS OF THE CITY FOR THE CARRYING ON OF A PUBLIC SERVICE ENTERPRISE; AND, FURTHERMORE, THAT A GRANT SO MADE IN THE ABSENCE

OF A SPECIFIC LIMITATION AS TO TIME, WILL BE PRESUMED TO BE UNLIMITED IN DURATION.

At the time of the enactment of the ordinance No. 826 supra, the Mayor and City Council of the City of Omaha were, by the act of the state legislature, empowered to "have the care, management and control of the city and its property," and had power "to pass any and all ordinances not repugnant to the constitution and laws of this state" (Laws of 1883, page 89, section 1), "to provide for the lighting of streets * * * and erection of lamp posts" (Id. Sec. 8), "and to care for and control * * * streets, avenues, parks and squares within the city" (Id. Sec. 24) and by act of the legislature, approved March 3, 1884, and before acceptance by the company of the grant in question, they were further empowered "to provide for the lighting of the streets, laying down of gas pipes and erection of lamp posts and to regulate the sale and use of gas and electric lights, the charge for electric light and rent of gas meters within the city, and to require the removal from the streets, avenues and alleys, and the placing underground of all telegraph, electric and telephone wires." (Laws of 1885, Chap. 13, p. 117.)

Under the decisions of the Nebraska Supreme Court the authority thus conferred vests in the municipality the power to grant to a public service corporation a franchise and right of way over the streets and alleys of the city which may be unlimited as to duration.

In the case of *Sharp vs. City of South Omaha* (53 Neb. 700) the city had enacted an ordinance propoing to grant to the South Omaha Gas Light Company, its successors and assigns, authority for a period of twenty-

five years to sell and supply gas within the city, and to lay and maintain pipes and mains under the surface of the streets, alleys and other public highways of the city. The charter provisions governing the city's action were as follows:

"The Mayor and Council shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city and shall cause the same to be kept open and in repair and free from nuisances" (Sec. 35); "to make contracts with and authorize any persons, companies or associations to erect gas works, electric or other light works in said city, and give such persons, company or association the privilege of furnishing lights to the streets, lanes, and alleys of said city for any length of time, not exceeding five years," etc. (Sec. 15); "to provide for the lighting of streets, laying down of gas pipes and erection of lamp posts and to regulate the sale and use of gas and electric or other lights and the charge therefor, and the rent of gas meters within the city and to require the removal from the streets, avenues and alleys and the placing under ground of all telegraph, electric and telephone wires." (Sec. 16.)

The bill alleged that the Omaha Gas Company as assignee of the South Omaha Gas Company intended to supply the City of South Omaha from its works in the City of Omaha, and did not contemplate the erection of works in the former city, and that, under the provisions of section 15, such a contract,—and especially a contract extending beyond a period of five years,—was unauthorized and void. The Court in overruling these contentions, said in part:

"It is admitted by the plaintiffs that the general power of control over the streets conferred by Sec. 35 would be sufficient if that section stood alone to authorize such an ordinance as the one under con-

sideration. It is practically admitted that subdivision 16 of section 68, standing alone, would not restrict the power conferred by section 35, even if it did not itself grant the power. It is, however, contended that sub-division 15 is a specific grant on the subject, which prevails against and limits the more general provisions, and restricts the power of the city in the premises to the granting of the right to lay pipes in the streets to such persons, companies or associations as have already or contemporaneously been authorized to erect gas works in the city and that then the franchise cannot endure for more than five years. * * * Subdivision 15 relates solely to the lighting of highways. Subdivision 16 relates among other things to the furnishing of gas to private consumers and the use of the streets for that purpose. They are separate provisions relating to different subjects, not intended the one to nullify the other, but intended to exist concurrently and each to control with reference to its own subject matter. We need not consider whether contracts may be made for lighting the streets with persons who have not gas works within the city. Entirely distinct from the provisions on that subject there is an ample grant of power, *unqualified as to persons, method, or time*, to regulate the laying down of mains, the sale and use of gas, and the rate to be charged therefor. The ordinance in question extends only to that subject, and is within the power."

It is true that the court was not called upon to determine the specific question as to the right of the city to grant a perpetual franchise, but in holding that notwithstanding the five-year limitation clause of section 15 the city was empowered under the provisions of section 35 to grant such a franchise for any period it might determine upon, the Court necessarily upheld the principle that there was no restriction on the authority of the city as to the duration of such a grant, and that in the language of the Court the city was authorized to

grant such a franchise "*unqualified as to time*": The reasons on which the decision of the court was based, would be just as applicable if the grant of the South Omaha Gas Light Company, instead of being for a period of twenty-five years had been wholly unrestricted as to duration.

It is manifest that the authority conferred upon the municipality by section 35 thus held by the court to be "*unqualified as to time*" in its authorization of the granting of such a franchise, is substantially identical with and conveys no greater power than the provisions above quoted under which the Mayor and City Council of the City of Omaha were proceeding in the enactment of ordinance No. 826. If, under the provisions of section 35, as above quoted, the Mayor and City Council of the City of South Omaha were authorized to grant such a franchise "*unqualified as to time*" then, manifestly, the Mayor and City Council of the City of Omaha under provisions of Sections 1, 8 and 24, above quoted, were equally authorized to grant such a franchise, "*unqualified as to time*".

In *Nebraska Telephone Company vs. City of Fremont* (72 Neb. 25) the Supreme Court of the state more directly and explicitly passed upon the precise question of the power of the city to grant an irrevocable franchise. The City Council of the City of Fremont had passed an ordinance providing in general terms that any person, company or corporation was authorized to erect poles and wires in the streets of the city of Fremont for the purpose of erecting and maintaining any telephone, telephones, telegraph or telegraphs upon obtaining the consent of the Mayor and Council of said city to such use of the streets "*under certain designated restrictions*"

and that "the consent of the Mayor and Council provided for in the first section of this ordinance may be given at any regular or special meeting of the Council and shall be entered upon the minutes and such consent shall authorize the use of the streets of said city for the erection of telephone or telegraph lines subject to such regulations as have been or may be provided by ordinance". Under that ordinance a permit was granted by the City Council to the Fremont Telephone Company to erect their poles and wires subject to the provisions of that ordinance. Subsequently the Fremont Telephone Company, which had not been incorporated at the time of the granting of the permit, was organized, the grant accepted, and an exchange constructed and some of the streets and alleys occupied for telephone purposes. The rights of the Fremont Telephone Company were afterwards purchased by the Nebraska Telephone Company and the business of operating a telephone exchange was carried on for twenty years, and a telephone system developed, estimated to be of the value of \$25,000. The city contracted with the telephone company concerning the location of electric light wires maintained by the city, and paid an agreed compensation for the use of the poles of the telephone company for the support of wires for a fire alarm system and levied and collected an annual occupation tax. In December, 1902, the Mayor and Council adopted a resolution forbidding the erection by the plaintiff of poles and wires on any parts of the streets, avenues and alleys of the city not already in use and prohibiting the placing of such structures in the public ways theretofore so occupied when by decay or usage they should become deteriorated, or unfit for the business of the exchange. The telephone company having

disregarded the prohibitions of this resolution, the city brought an action to enjoin a repetition of such conduct.

The Court in the opinion says:

"It is next contended that, even if the proceedings were sufficiently formal and complete, they amounted to a grant to the members of the association personally, and not to their successors or assigns, of a franchise having the character of an easement in, over and upon the streets, avenues, and alleys of the city, and that such an easement is real property, an estate in land, which can be alienated only with the consent of the public, expressed through the legislature, and then only by means of an instrument in writing executed in conformity to the provisions of the statute relative to the conveyance of land. And it is urged that no such consent has been shown, and no such instrument has been produced, and that therefore the plaintiff is a mere trespasser upon the streets, and its poles and wires, unlawful obstructions and nuisances, which it is not only the right but duty of the city authorities to remove therefrom. Granting, for the sake of discussion, the defendant's premises, we do not think that its conclusion follows therefrom. *By the terms of the ordinance, there was a grant to the association, in perpetuity, of a right of way or easement over all its public ways, without restriction or limitation.* It was subject to certain conditions and regulations as to the manner of user, which are not in controversy here, and which we have not thought it necessary to set forth, and it was, and is, doubtless, forfeitable for unspecified acts of abuse, abandonment and non-user."

If the City of Fremont was empowered to grant to the Fremont Telephone Company a right of way or easement over all its public ways for the transaction of a telephone business, "in perpetuity" and "without restriction or limitation," then the City of Omaha under like legislative authorization was likewise authorized to

grant to the New Omaha Thomson-Houston Electric Light Company a right of way or easement over its public ways for the conduct of a general electric light business "in perpetuity and without restriction or limitation". In the Fremont case, as in the present case, there was no attempt in the ordinance or resolution to specify or limit the period for which the grant was made. Neither in the one case nor in the other was there any language indicating an intention on the part of the city to limit the duration of the franchise granted, and in the one case as in the other, the claim that the duration of the right granted was for a limited period necessarily could stand on no other foundation than the conclusion stated by Judge Adams in the opinion of the Circuit Court of Appeals that the city was without legislative power to grant a franchise unlimited as to time. But, on this question, the Supreme Court of the State in the Fremont Telephone case reaches a conclusion diametrically opposed to that announced by Judge Adams. Judge Adams makes no reference to the Fremont Telephone case, nor to the case of *Sharp v. South Omaha*, nor to the case of *Plattsmouth v. Nebraska Telephone Company*, to which we will hereafter call attention.

The decision in *Nebraska Telephone Company v. Fremont* was rendered on May 18, 1904. It was not until December of the same year that the City Council of the City of Omaha passed the ordinance requiring the Electric Light Company to place in underground conduits, its poles, wires and cables within a designated business district. Both of the above decisions had been rendered, therefore, before the Electric Light Company, thus on the demand of the city and in compliance with the requirements of its ordinances, expended over \$400,-

000 in removing its poles and wires from the prescribed business district and in constructing underground conduits and placing its wires and cables therein. And, during all of the period between the rendition of the decision of the Supreme Court in the telephone case on May 18, 1904, and the time of the institution of this action in June, 1908, the appellant company expended large sums of money in extending its conduits and its overhead lines and in the purchase of new and improved machinery and in properly equipping itself for handling the rapidly growing business demanded by the city with its increasing population and business, not only to enable it to meet the necessities of the immediate present, but in part as a preparation for the demands of the future.

It has been too often adjudicated to require discussion that where the highest court of a state has placed a construction upon the meaning of the state statutes, such a construction becomes a part of the statute, and also of any contract entered into under its authority, to the same extent as if the construction had been embodied in the language both of the statute and of the contract, and that this is especially true where, as in the present instance, a party to such contract, after the rendition of such opinion, has expended money or otherwise placed himself in a different attitude than he was before, and his action in that regard will be conclusively presumed to have been in reliance upon his rights as established or affected by such judicial construction.

To adopt the language used by this Court in *Edwards vs. Kearney* (96 U. S. 601), "it is the settled doctrine of this Court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incor-

porated in its terms. This rule embraces alike those that affect its validity, construction, discharge and enforcement." And further in *Gulf & Ship. Co. v. Hewes*, 183 U. S. 71, every "contract is presumed to have been entered in upon the basis and in contemplation of the existing constitution and statutes, and upon the established construction theretofore put upon them by the highest judicial authority of the state." (Citing authorities). See also—

Brine v. Insurance Co., 96 U. S. 634.

Taylor v. Ypsilanti, 105 U. S. 71.

Great Southern Hotel Co. v. Jones, 193 U. S. 547.

The question as to a city's authority to grant a perpetual franchise was again before the Supreme Court of the State of Nebraska in the *City of Plattsmouth v. Nebraska Telephone Company* (80 Neb. 460). In the year 1898, the City of Plattsmouth enacted an ordinance providing:

"Section 1. That the Nebraska Telephone Company, its successors and assigns, be and are hereby granted the right of way for the erection and maintenance of poles and wires and all appurtenances thereto for the purpose of transacting a general telephone and telegraph business through, upon and over the streets, alleys and public grounds of the City of Plattsmouth, Nebraska; provided, that said company shall at all times when requested by the proper authorities permit their poles and fixtures to be used for the purpose of placing and maintaining thereon, free of charge, any wires which may be necessary for the use of the police or fire departments of the City of Plattsmouth, Nebraska; and further provided that such poles and wires shall be erected so as not to interfere with ordinary traffic through such streets and alleys, and under the

supervision of the committee on streets, alleys and bridges."

It will be observed that the language of this granting ordinance is substantially identical with that of the granting ordinance in the present case. In 1904 the City Council of Plattsmouth passed an ordinance requiring that the poles and overhead wires on Main Street between First and Eighth streets should be removed to the alleys adjacent thereto. The Telephone Company having failed to comply with the provisions of the last mentioned ordinance, suit was instituted by the city for a mandatory injunction to restrain the Telephone Company from using the streets, alleys and public grounds of the city and from operating its telephone system.

"Subdivision XII, Sec. 69 of plaintiff's charter (Comp. St. 1905, ch. 14, art. 1) is in the following words: 'To make all such ordinances, by-laws, rules, regulations, resolutions, not inconsistent with the laws of the state as may be expedient in addition to the special powers in this chapter granted, maintaining the peace, good government, and welfare of the corporation, and its trade, commerce, and manufactories.' Subdivision 24 of said section authorizes the city authorities to regulate the streets, 'lamp posts, awning posts, and all other structures projecting upon or over and adjoining, and all other excavations through and under the sidewalks in the said city or village.' Subdivision 28 empowers the city or village 'to open, create, widen, or extend any street, avenue, alley or lane, or annul, vacate, or discontinue the same whenever deemed expedient for the public good.' The use of the telegraph and telephone is so far a public convenience and necessity that in some states property may be condemned therefor under the power of eminent domain. *State v. American & European News Co.*, 43 N. J. Law, 381; *Pierce v. Drew*, 136 Mass. 75; *Pensacola T. Co. v. Western Union T. Co.*, 96 U. S. 1. It is there-

fore evident that the use of streets for telephone or telegraph purposes is a use for public purposes against which no objection can be made. As said in *Hobbs v. Long Distance T. & T. Co.*, 147 Ala. 393, 7 L. R. A. (n. s.) 87 ; 'Since the days of the Caesars, public highways have received the careful attention of all governments, not only for the purpose of providing ways by which armies could be moved and the people travel, but for the purpose of opening up avenues of communication by which reports could be speedily brought to the capital, and the interchange of commerce promoted. The laws of congress have provided for post roads, etc., before the telegraph was known, provided for the same privileges for telephone companies, as were given to railways in using the public lands, and, in later days, it has developed the exceedingly valuable system of 'post routes' and free mail delivery along the public roads of the country, so that not the least important function of the public roads of the country is the transmission of messages from place to place.' The people of the City of Plattsmouth are not alone interested in the telephone system of that city, but every other community in the state with which communication is made is equally interested, and the state itself has recognized the utility and necessity of this method of communicating news by granting a right of way for the building of such lines over the public highways of the state. Comp. St. 1905, ch. 89a, sec. 14. Under the general power given to the plaintiff by its charter and the general control which it exercises over the streets and public grounds of the city, its right to extend to the defendant the privilege of occupying its streets and public grounds cannot be questioned. *Nebraska T. Co. v. City of Fremont*, 72 Neb. 25.

The only question remaining is whether the public necessity or convenience requires that its wires in Main street should be placed in underground conduits or removed to the alleys north and south of said street between First and Eighth Streets. That the rights of the defendant in the streets of the city

must yield to public necessity or convenience is beyond question or dispute; but having acquired a right in the streets, and having made expenditures on the strength of the grant extended by the city, the authorities are quite uniform that this right cannot be taken away in an arbitrary manner and without reasonable cause. In *Northwestern T. Co. v. City of Minneapolis*, 81 Minn. 140, it is said: 'When such an ordinance has invited investments and expenditures made in good faith and in reliance upon it, the city authorities cannot arbitrarily impose by subsequent regulations, without necessity, or the demands of public convenience, additional burdens upon the company which are clearly beyond the reasonable exercise of the police power.' In the body of the opinion it said: 'An ordinance of a municipality surrendering a part of its powers to a corporation to secure and encourage works of improvement, which requires the outlay of money and labor to subserve the public interests of its citizens when accepted and acted upon, becomes a contract between the city and the corporation which relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured.' In support of this principle authorities from the states of Ohio, Louisiana, Iowa, Massachusetts, Wisconsin and numerous federal decisions are cited. That the city council may make reasonable regulations relating to the maintenance and repair of defendant's plant is not open to argument; but such regulation is not to be exercised at mere whim and caprice. It must be proportionate to, and commensurate with, the public necessity for the protection and promotion of the public health, safety, necessity or convenience. *City of Burlington v. Burlington Street R. Co.*, 49 Ia. 144. The application of the police power cannot be extended by the authority which is intrusted with such application to an arbitrary misuse of private rights. That the city may order the removal of poles which endanger the citizens because of a rotten condition, and protect its inhabitants against any conduct of the business which endangers the public health or

safety, is not a question open to dispute; but nothing of the kind appears in the record before us. As before stated, Main Street is 100 feet in width. There is no evidence of a congested condition of the street or of any necessity from other causes for removing the defendant's poles.

So far as the record discloses, the action of the city council is arbitrary in its nature and wholly unsupported by any reasonable cause. Such being the case, we think the district court was right in refusing the injunction, and we recommend an affirmance of its judgment." (p. 363-4-5.)

It is true that the Nebraska Court does not here announce in specific words that the grant from the City of Plattsmouth to the Nebraska Telephone Company was perpetual or irrevocable, but this does not detract from the effect or the weight of the opinion. The decree of the Court establishes the inviolable character of the rights granted to the appellant company as being in the nature of contract rights, which having been once granted remained vested in the company, beyond the power of the city to arbitrarily recall or to even modify or diminish except as a matter of demonstrated public interest in the exercise of the police power of the municipality. Following the decision in *Fremont vs. The Telephone Company* the State Supreme Court again holds in substance and effect that under the powers conferred upon the municipality of Plattsmouth (which are substantially identical with those conferred upon the municipality of the City of Omaha) the city was authorized to enter into an irrevocable contract or franchise granting the right of way over its streets and alleys and public places of a public service corporation, and did enter into such an irrevocable contract or franchise by the passage of an ordinance sub-

stantially identical in its terms with those of the ordinance now under consideration.

Thus, by repeated adjudication and without dissent the Supreme Court of the state has upheld the authority of the Mayor and City Council of the City of Omaha under the delegation of legislative authority under which they acted in the present instance, to confer upon the New Omaha Thomson-Houston Electric Light Company an irrevocable franchise or right. The most cogent reasons underlie the rule that the federal courts will follow the construction placed upon state statutes by the state courts, and will hold inviolable contract rights arising under such statutes as construed by the state courts. The enforcement of this rule is especially necessary with reference to contracts that are so intimately related to state polity as are those entered into by municipalities for the purpose of securing to the public the performance of designated public services.

Each state is entitled to determine for itself whether it will authorize the granting of perpetual franchises. Much may be said in favor of such a policy. Not only will the municipality, by reason of the long tenure granted, secure better terms from those willing to risk their capital in an enterprise which, in the early stages of the city's growth is necessarily of doubtful profit, but the character of the plant will be better and the service to the public improved when a public service corporation can afford to make large expenditures without expectation of immediate returns, but with the hope of future profit, so that its investment is not for merely temporary purposes, but is intended to meet the increasing demands of the future.

This is well illustrated in the present case. It is

manifest that the Electric Light Company would not have expended four hundred thousand dollars in complying with the city's order to put its wires underground, except on the belief that its franchise was permanent; and surely it would not have done so if the city had then advanced the claim now made that the company's franchise would expire before that work could be completed. Nor would the company have expended millions of dollars in establishing and maintaining its thoroughly up-to-date plant had the city earlier questioned the permanence of its right of way in the city streets. It would be just as reasonable for the state of Nebraska to tear up the tracks of a steam railway company and thus deprive the people of that transportation service, as for the City of Omaha to cut the wires and destroy the enormously valuable property of the Electric Light Company and thereby plunge the city in darkness and destroy the business of thousands of business enterprises dependent upon the service furnished by this company, not only for light but for power. Such conduct on the part of the city could only be characterized as a wanton and senseless destruction of property. No possible advantage could accrue to the city; on the contrary inconceivable harm and disadvantage would result to the city and its people, as well as to the company. The city has no intention of depriving itself and its inhabitants of the use of electric current for light, heat and power, and no new company could possibly be in as good a position to render that service as is the present company.

No claim is made that the company has ever failed to furnish good service at reasonable prices or to fulfill all of the duties incumbent upon it, under the terms of the

contract; on the contrary, it will be admitted that the service furnished by this company has been above criticism and that the company has always readily complied with requirements of its contract, and with all demands made upon it by the city.

Nearly every business incentive is in favor of the granting of such a franchise of long duration, except where the policy obtains of substituting municipal ownership at the termination of a particular franchise, and even then the just rights of the state are protected under the power of eminent domain.

As was well said in *Detroit Citizens' Ry. Co. vs. Detroit* (64 Fed. 630):

"The evils to be apprehended from long grants of easements to such companies seems to us not to be such as to justify a constructive limitation on that account. The power to make an irrevocable contract giving an easement of some considerable duration is an inseparable incident in any scheme for furnishing such public facilities. * * * The duration of such grants must be a question of discretion to be exercised by some public authority. That the exercise of that discretion should be left to the local government as a question of purely local interest seems most consistent with the proprieties of the case."

Equally suggestive is the language of the Court in *East Tennessee Tel. Co. v. Board of Councilmen* (190 Fed. 346):

"In construing the grant one has to be on his guard against allowing the policy of the state as evidenced by its present Constitution and laws to affect his judgment. It is its policy now that no such privilege shall be given away under any conditions. It shall only be sold to the highest bidder and that for a limited period of time, not exceeding 20 years. When this grant was made, no such policy was in existence. This circumstance has a bearing

upon the construction of the grant. It has what has been termed 'a contemporary equation'. It contains 'a standpoint as well as a subject'. In ascertaining its meaning, therefore, one must transport himself to those days and look at it through their eyes. I think that it must be conceded on all hands, that these general considerations, applicable to a determination of the question, are sound."

But with the question of business policy the courts have no concern, and when a state by legislative enactment, as interpreted by the state court, has authorized its cities to enter into perpetual contracts for the operation of public service enterprises, the propriety of that policy is not a subject for judicial inquiry by the courts of other states or of the United States. Neither will the court concern itself as to the wisdom of any particular contract entered into by a municipality within the limits of its charter powers.

THE CONSTRUCTION PLACED BY THE SUPREME COURT OF NEBRASKA UPON THE POWER OF THE CITY OF OMAHA TO GRANT A PERPETUAL FRANCHISE UNDER THE STATUTES CONFERRING AUTHORITY OVER THE STREETS AND ALLEYS OF THE CITY, IS SUPPORTED BY SOUND REASON, AND BY THE WEIGHT OF AUTHORITY ELSEWHERE.

Courts have generally upheld the proposition that where a municipality is granted control over its streets and alleys, (and especially where, as in Omaha, the city owns the fee in the streets), the city is thereby vested with entire jurisdiction over contracts or franchises with public service corporations, regarding all features of such franchises or contracts, including the question of

duration, and that when such franchise or right is granted without limitation as to time, the right conferred is irrevocable.

The grant of an easement in the streets and alleys is conferred for the purpose of securing a service to the public, to be exercised in harmony with the rights of the public in the streets, and subject to regulation in the interest of the public. It does not deprive the public of its right in the streets. It does not create a monopoly by excluding like grants to others. It does not abridge or suspend any governmental powers. The city is as free to exercise all of its powers—those existing when the grant was made, as well as those subsequently given—as if the grant had never been made. It can exercise its power to provide service to the public by constructing and operating its own system, or by granting another franchise. It can pass and enforce any ordinance for the government of its inhabitants, which it has authority to enforce regardless of this grant.

The irrevocable right to occupy the streets is determined by the essential character of the transaction. If the transaction has the essential elements of a contract—mutuality, consideration and the like—and has been legally made, it is irrevocable, whether it be made for a short time, a long time, or without limit of duration; for the obligation, whatever it may be, cannot be impaired, and vested rights are protected by the constitutional provision prohibiting the impairment of contract. No doubt the city, in this instance, could, if it had desired, have incorporated in this grant a provision reserving the right to modify or revoke it at will, provided it could have found some person or company willing to invest the money necessary to enable it to render

the public service. But the grant reserves no such right in the city, and there being no limitation as to time in the ordinance the grant was necessarily perpetual.

There was no statute of the state which in any manner required the city, when making a grant of this character, to reserve a right of revocation, to limit its duration, or which prohibited it from making the grant without limit of duration.

But it was also claimed in behalf of the city that there was no statute which expressly gave the city power to make the grant "perpetual," and it was contended that, in order to make such a grant "perpetual," the city must have express power, and that, the city having failed to reserve a right of revocation, the law reserved that right for it, regardless of the terms of the grant.

It seems now to be settled, for the Federal Courts, that, although the grant is for a limited term, a municipal corporation cannot make it *exclusive* unless the power has been *explicitly* given, or, is *indispensable* to the exercise of powers so given.

Detroit Citizens Street Ry Co. v. Detroit Ry Co.
(171 U. S. 48).

Water Co. v. City of Hutchinson (207 U. S. 385).

But there is a distinction between an "explicit" and an "express" grant of power which is not always observed. To be "explicit" it must be specifically set forth in the words of the grant, while it is "express," as distinguished from implied, when, as a matter of fair construction, it is *embraced* in the terms of the grant.

The proposition that the grant to a municipality of the control over its streets and alleys vests in the city authority to grant a public service franchise or license

irrevocable in its character, is constantly reiterated in the books. In most instances where a court has announced this doctrine the further proposition is directly adjudged or assume to be true, that such a municipal grant of a public service franchise or license, in the absence of specific limitation as to time, is construed to be for an unlimited time.

In *Seattle v. Columbia Company* (6 Wash. 379; 33 Pac. 1048), a railway company was granted permission to lay tracks on certain streets and alleys in the City of Seattle, under the power conferred upon the city by the provisions of its charter authorizing it "to survey and establish blocks and streets, alter the same, condemn land therefor, and to authorize the laying of railway tracks on streets, alleys and public places," and authorizing the city "to build and regulate wharves and piers at the foot of any street, etc." The Court says:

"Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for should it become necessary to thereafter undo the work, and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of the power of eminent domain upon making compensation; and this is a sufficient protection for the rights of the city, and one which at the same time affords protection to the rights of the respondents." (Citing authorities.)

In construing a provision of the statute authorizing telegraph and telephone companies to construct and maintain their lines along public roads "and along the streets of any city, with the consent of the council or trustees thereof," the Supreme Court of Louisiana, in case of *City of New Orleans v. Great Southern Telephone Company* (40 La. Ann. 41; 8 Am. St. Rep. 502), held that the defendant company had acquired a perpetual right under an ordinance providing "Be it ordained by the City Council of the City of New Orleans that the New Orleans Telephonic Exchange is hereby authorized to construct and maintain a line or lines of telegraphs through the streets of this city, the line or lines to be constructed along such streets at such points and in such manner as to kind and position of the telegraph poles, the height of the wires above the streets, and other particulars as the administrator of the Department of Improvements of this city may direct," etc., and that consequently an attempt on the part of the city to subsequently require the payment of a certain sum per annum for each pole placed was void as an impairment of the contract. In the opinion, the Court says:

"The only remaining question is, whether, after granting the defendant the authority to construct and to maintain its lines without limitation as to time, and with no other consideration than the furnishing of certain free telephonic facilities to the city—after the defendant has, at great expense, established its plant, and constructed its lines, and when it has fully complied with all the conditions imposed—the city can now exact this large additional consideration for the continued enjoyment of privileges already granted. * * *

Obviously, upon the clearest consideration of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevoc-

able contract, and the city is powerless to set it aside, or to interpolate new and more onerous considerations therein. Such has been the well recognized doctrine of the authorities since the Darmouth College case, 4 Wheat. 518."

In the case of *Michigan Telephone Company v. City of St. Joseph* (121 Mich. 502; 80 N. W. 383), a telephone company presented a petition to the common council of the village of St. Joseph for permission to construct, maintain and operate a telephone system. Permission having been duly granted the Telephone Company constructed and put in operation its telephone system, which was subsequently purchased and then operated by the complainant company. Thereafter the common council passed a resolution declaring said poles and wires a nuisance and instructing the street commissioner to forthwith remove the same. In granting the injunction prayed for, the Court says:

"When the construction company and the complainant accepted the privileges granted to them by the laws of the state, and the municipality had duly given its permission, and the corporations had expended their money in valuable improvements, contracts were entered into which neither the state nor the municipality could impair or destroy, in the absence of power to do so being reserved in the grant itself, or in the constitution which becomes a part of all such contracts. The constitution and the statute clothe municipalities with power to control their streets and alleys and protect them from things injurious and dangerous to the public; hence they have the power to make all reasonable rules and regulations for the erection and maintenance of poles and wires for telegraph and telephone companies."

In the case of *Northwestern Telephone Company v. Minneapolis* (81 Minn. 140; 83 N. W. 527) a telephone company had been granted the right to use the streets

of the defendant city for the erection of poles and overhead lines under specified conditions. In prohibiting the enforcement of an ordinance unreasonably requiring the defendant company to place its wires underground, the Supreme Court of Minnesota says:

“Recently the subject of municipal control over the erection and maintenance of poles and electric wires in the streets of cities has received particular attention from the courts, and it has been held that an electric company, which has been granted by the local authorities, the right to use the streets, and has constructed its line in compliance with and in reliance upon the terms and conditions of such grant, cannot be made the subject of new conditions, aside from what may necessarily be required of it by the city in proper exercise of the police power and the control and regulation of the streets.”——

“An ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which require the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation who relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured. They are protected by the organic law which forbids the impairment of contracts or interference with vested rights without due process of law.”

In *City of Quincy vs. Bull*, 106 Illinois, 337, 349, it is said:

“In this State there is vested in municipal corporations a fee simple title to the streets. Under the power of exclusive control over streets, it is very well settled by decisions of this court that the municipal authorities may do anything with, or allow any use of, streets which is not incompatible with the ends for which streets are established, and that it is a legitimate use of a street to allow a railroad track to be laid down in it. *Moses v. Pittsburg, Ft.*

Wayne & Chicago Railroad Co., 21 Illinois, 515; *Murphy v. City of Chicago*, 29 Illinois, 279; *Chicago & Northwestern Railway Co. v. People ex rel*, 91 Illinois, 251."

Under ordinances passed by the City of Cincinnati, a certain railway company was granted authority to maintain and operate a street railroad upon certain streets of the city. The power of the city to grant such authority rested upon the following statute:

"If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied."

In construing the grant thus made, Circuit Judge Lurton, speaking for the Court of Appeals for the Sixth Circuit, in *Louisville Trust Co. v. City of Cincinnati* (76 Fed. 315), said:

"The grant under the ordinance of December, 1871, was unlimited as to time. There was at that time no statutory restriction upon the power of a city to grant an unlimited street easement to either a railroad or street-car company, having the requisite franchises from the state. The act limiting the power of a city to a term not exceeding 25 years was not passed until May 14, 1878. Neither do we think there was any implied restriction upon the power of the city springing from reasons of public policy. The corporation to which this grant was made was perpetual, and we see no sufficient reason which would justify the court in holding that it was not within the discretion of the municipal government to grant to such a company an unlimited easement upon the streets."

Judge Lurton, in considering the same proposition in *Board of Councilmen vs. East Tennessee Tel. Co.* (115 Fed. 304), says:

"By the Tennessee act of April 21, 1899, the charter of Morristown was so amended as to include within the powers which might be exercised by ordinance the power to grant privileges and franchises in the use of the streets. This act removed all doubt as to the power of the city, and after its enactment and on September 1, 1899, an ordinance was duly passed giving to the East Tennessee Telephone Company the right to erect poles and string wires on the streets and alleys of the city." (p. 306).

"The consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system was the grant of an easement in the streets and a conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietary or contractual right rather than legislative, was irrevocable after acceptance, unless the power to alter or revoke was reserved. This principle has too many times been declared and applied by this court to require further elaboration." (Citing authorities). (p. 307).

In the very recent case of *Louisville vs. Cumberland Telephone Company*, (224 U. S. 650), this Court has had occasion to pass upon this precise question. The case is instructive and will be again referred to on other phases of the case now under consideration. The Ohio Valley Telephone Company had been chartered by the State of Kentucky with authority to construct and maintain telephone systems, over, along and in highways, streets or alleys in the City of Louisville, "with and by the consent of the general council of said city." In 1886 the city council passed an ordinance which, after reciting this section of the charter, ordained that the act of

the legislature above mentioned, so far as it relates to the streets of Louisville, "is hereby ratified and confirmed and the right is hereby granted and confirmed to the said Ohio Valley Telephone Company, its successors and assigns, to maintain a telephone system and to erect poles and string wires thereon; * * * and to operate its telephone lines over, along or under any street, avenue, alley or sidewalk in the City of Louisville." The rights of that company having been purchased by the Cumberland Telephone Company, the latter fully complied with the agreement and established and operated a telephone system. In 1908 a difference having arisen between the city and the company, the former passed an ordinance repealing the provisions of the ordinance of 1886, whereupon the complainant instituted an action for an injunction to restrain the city from interfering with the company in its use of the streets, alleys and public places. This Court in its opinion said:

"Under the present constitution of Kentucky street franchises cannot be granted for longer than twenty years and then only to the highest bidder, after public advertisement by the city authorities. But in 1886, when the Ohio Valley Telephone Company was chartered, the legislature not only had the sole right to create corporations and to grant franchises but, without municipal consent, it could have authorized the company to use any and all streets in the city of Louisville. Instead, however, of exercising this plenary power, the charter declared that the company might maintain its telephone system, erect poles and string wires over the streets and highways of the city, with and by the consent of the General Council. These provisions of the charter gave the municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept—in which event

the franchise granted by the State would have been nugatory. But, when the assent was given the condition precedent had been performed, the franchise was perfected and could not thereafter be abrogated by municipal action."

So far as the principle now under discussion is concerned, it is, of course, wholly immaterial whether, as in Kentucky, the state legislature authorizes a public service corporation to occupy city streets, provided the city's consent is first obtained, or whether, as in Nebraska, the state legislature delegates to the city full control over its streets and thereby vests in it full power to grant or withhold from public service corporations authority to occupy the city streets. If, in the case just cited, after consent had been given by the city and acted upon by the public service corporation, a contract arose that was irrevocable by the city or state, as this court there announces, then, undeniably, in the present case the grant by the City of Omaha when acted upon by the Electric Light Company became a contract thereafter irrevocable and protected by the constitutional guaranties.

THE TERMS OF THE GRANTING ORDINANCE AND THE CIRCUMSTANCES UNDER WHICH IT WAS PASSED ARE INCONSISTENT WITH THE THEORY THAT THE GRANT WAS LIMITED IN DURATION.

In support of its decision it is argued by the Court of Appeals that certain facts and circumstances of this record show an intention on the part of the city to grant a right of way for only a limited period of time. None of the reasons urged support the conclusion announced.

In the opinion it is said:

"A perpetual franchise even if not exclusive in fact becomes largely so by the advantage in the race which preoccupation of the field and perpetual right to continue in it afford. And while it may not be technically obnoxious to the Constitutional prohibition against 'granting special privileges or immunities,' it is so unusual and extraordinary as to require, in our opinion a more specific legislative authorization than the general language relied on by the company therefor." (R. 120-121).

In the light of the facts of this case and of the foregoing decisions, the conclusion thus announced by Judge Adams cannot be sustained. Nowhere in this record did the Court obtain information to warrant the assertion that at the time of this grant, the conferring upon a public service corporation of a perpetual right of way for a public service enterprise was "unusual and extraordinary," or, as stated elsewhere in the opinion "important and valuable." There was no such averment, no such contention, and no such evidence. The subject was not presented or discussed in any form.

So far from the court being justified in such a judicial assumption, we confidently assert the contrary to be the fact. At the time of the granting of this right of way in 1884, not only in Nebraska but throughout the country, and especially throughout the West, when neither states nor municipalities were much given to looking far into the future, the granting of perpetual franchises to municipal service corporations was usual and ordinary, and was more common than the granting of such franchises for limited periods. And we think it perfectly fair to assert that, that at the time of this grant, it was wholly a matter of speculation as to whether

the grant with its perpetual feature was, or ever would be "important and valuable."

We submit that the court has predicated its conclusion upon this important question, involving large pecuniary interests, upon a proposition of fact which was not alleged or proved, upon which no hearing has been had, which, to say the least, is extremely problematical as to its correctness, and which is, in fact, immaterial to a correct decision of this case. For if it were true that the granting of such a perpetual right was "unusual and extraordinary," or that the rights conferred were "important and valuable," that would constitute no justification for the Federal Court applying its judgment on the question of what would have been a wise contract for the City of Omaha to have entered into with the Electric Light Company in the year 1884, and thereby undertake to abrogate a contract which was entered into under the protection of the State Constitution, as it has been repeatedly construed by the highest authority of the state, and which, moreover, was a contract entirely valid under the law.

That the court was in error in holding that the granting of a perpetual franchise required "a more specific legislative authorization than the general language relied on by the company, therefore," is established by the authorities heretofore cited. "General language" referred to is the general language of the statutory provisions conferring authority over streets and alleys and over the lighting of same which was set forth at the commencement of this subdivision of this argument. As we have seen it has been clearly established by the Supreme Court of the State in its construction of that "general lan-

guage" that the city did have authority to grant such perpetual right or franchise.

Sharp v. City of South Omaha (supra).

Nebraska Telephone Co. v. City of Fremont,
(supra).

City of Plattsmouth v. Nebraska Telephone Co.,
(supra).

Equally undeniable is the conclusion reached by the courts generally, supporting the construction by the Nebraska Court, that the "general language" of the legislative authorization above referred to does confer upon a municipality ample power to grant such a perpetual franchise.

Seattle v. Columbia, etc., Co. (33, Pac. 1048).

City of New Orleans v. Great Southern Telephone Co. (40 La. Ann. 41; 8 Am. St. Rep. 502).

Michigan Telephone Co. v. City of St. Joseph, (80 N. W. 383).

Northwestern Telephone Co. v. Minneapolis (83 N. W. 527).

Louisville Trust Co. v. City of Cincinnati (76 Fed. 315).

Board of Councilmen v. East Tennessee Tel. Co.,
(115 Fed. 304).

Louisville v. Cumberland Telephone Co., supra,
(224 U. S. 650).

The learned Court of Appeals in the opinion of which we complain proceeds as follows:

"The ordinance when taken as a whole and construed in the light of what was expressed as well as unexpressed in it and in view of all the attending facts and circumstances, discloses, we think, a clear purpose not to grant a perpetual franchise.

The right to use the streets of the city forever to inaugurate and promote a private enterprise, would seem to have been so important and valuable a fea-

ture of the contract as to irresistably lead the contracting parties to mention it specifically if they intended to provide for it and not leave its existence dependent upon implication.

The ordinance actually reserved to the city the right to require the removal of the poles and wires from the streets within sixty days after the City Council should declare the necessity therefor by ordinance. This is not only inconsistent but it seems quite repugnant to the claim of perpetuity now made by the company." (R. 121).

To our mind, the insertion of the reservation to which the court refers indicates rather an appreciation of the fact that the franchise was to be of unlimited duration. Because the rights were not limited in time, it was deemed important to insert this clause so as to make it clear that, in case of a necessity arising which might require the placing of all electrical wires underground, the City could require them to be placed there. The proviso imports careful consideration and foresight on the part of the city council.

As to the court's remarks regarding the importance and value of a franchise or street permit enabling the Company to inaugurate and carry on perpetually, under ordinary circumstances, its business of distributing electricity to the public, and the subsequent statement in the opinion that "it is improbable that the mayor and city council with due regard to the rights of the inhabitants of the city would tie their own hands as well as that of all future councils and mayors by granting a perpetual franchise," we desire to say that in our opinion it takes an altogether erroneous view as to what is in the interest of a municipality in this matter of granting to public service corporations what are commonly called "franchises." It is an error not infrequently shared by courts

and some members of the public. The generation and distribution of electric current for the purpose of supplying various wants of the public are absolutely essential in modern life, as are the services performed by street railways and telephone companies. Speaking as long ago as 1865, in relation to facilities for travel, Judge Davis said in the case of the Bringhampton Bridge, 3 Wall. p. 74:

"The wants of the public are often so imperative that a duty is imposed on government to provide for them; and as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

The service performed by such a company as was the original grantee under the ordinance in controversy, and as the Omaha Electric Light & Power Company is now, is something upon which the city of Omaha and its people are dependent for their comfort, safety and convenience; and that a city council, recognizing such fact, should confer upon a company and its successors the right to perform this service, under the obligations which the statutes of the State relating to the public service corporations impose, is not a startling proposition. What of importance has a city in such case surrendered? The poles and wires involved in furnishing this service are to be constructed and maintained in such a way as not to

incommode public travel. The company can do nothing which is not compatible with the ends to which the streets are established. The right to regulate the use of these distributing agencies is still in the city, as is also the right to fix within constitutional limitations the rates therefor and generally to regulate the manner in which a company's business shall be carried on. The city may also at any time grant a similar franchise to a new or rival company.

A case like the present does not, as do many of the franchise cases in the books, present a question with regard to the substantial surrender by a municipality of governmental functions. In the first place, the true view, we think, as to the nature of a franchise like the present one—that is to say, a consent by the city to the occupancy of its streets by the poles and wires of a company for the purpose of maintaining a general electric lighting business—is, to use the language of Mr. Justice Lurton, in *Morristown v. East Tennessee Telephone Company*, 115 F. R. 306, that the granting of the consent is “in a large sense the exercise of a proprietary or contractual right rather than legislative;” and it is obvious that in the long run a city, where the governmental rights of rate regulation and the like to which we have referred are all the while reserved to the public, performs its duty towards its own inhabitants with better results by allowing one company to occupy the field indefinitely under a reasonable sense of security than by merely authorizing a company to furnish the service for a comparatively short term of years. In the latter case the uncertainty of its tenure discourages the investment of funds to meet growing needs of the community and tends to the impairment of the service.

This view is one that is growing in public favor, as

is evidenced, for example, by Public Service Commission Acts in Wisconsin, New York and elsewhere, which provide for an "indeterminate" franchise, or one to be held by a company during what may be termed good behavior. That is practically the tenure, and all the tenure, which the Omaha Electric Light & Power Company may be said to have under the franchise in controversy, even though it be termed a "perpetual" franchise. As has been shown elsewhere, the Company's right to the continued use of the streets may be terminated in case it should fail to perform the public services which form the consideration of the grant. We repeat that, so far as any argument against the long duration of a franchise is to be based upon any surrender of governmental functions by the municipality granting, the case is utterly unlike those in which municipalities have attempted to confer an exclusive franchise, or to give a public service corporation the right in perpetuity, or for a long term of years, to maintain specified minimum rates. That type of cases is illustrated by

Home Telephone Co. v. Los Angeles, 211 U. S. 265.

There the municipality had undertaken to make a contract with the telephone company, fixing unalterably for a term of years the rates to be charged for telephone service. The court by Judge Moody refers to the gravity of an act whereby the power of government is surrendered, and says that any alleged surrender of the power, as well as the supposed authority to make it, must be closely scrutinized. But different considerations apply, we submit, where the rights which a given ordinance confers upon a public service corporation may be said to be granted in the exercise of the business or proprietary power of the city, rather than its legislative

power, and where there cannot be said to be in any proper sense a surrender of the power of government.

The Court of Appeals does not indicate what were "the attending facts and circumstances" which in the mind of the Court "discloses a clear purpose not to grant a perpetual franchise" except as indicated in the next two paragraphs of the opinion. We submit with all confidence that there is nothing whatever in the ordinance which "discloses a purpose not to grant a perpetual franchise." On the contrary we assert that the ordinance "taken as a whole" and "constructed in the light of what was expressed as well as what was unexpressed, and in view of all of the attending facts and circumstances," discloses a clear purpose to grant a perpetual franchise. There is nothing in the ordinance indicating an intention to grant a franchise, license or right for a prescribed period. There is nothing in the ordinance indicating any purpose to limit in duration the time during which the Electric Light Company was to continue in the discharge of the duties incumbent upon it as a public service corporation: to furnish electric current for lighting the streets and public places of the city and for use by all of the inhabitants and institutions that might require the use of such electric current.

The rights to use the streets of the city was not solely "to inaugurate and promote a private enterprise." On the contrary that right was granted primarily to inaugurate and promote a public enterprise, to-wit, the furnishing of electric current to the city and its inhabitants. The Mayor and City Council would be wholly without jurisdiction or authority to grant the right to use the streets of the City for any period whatever merely to "inaugurate and promote a private enterprise." Ordi-

nance 826 was enacted under authority conferred by the legislature upon the Mayor and Council for the purpose of securing to the City and its inhabitants the performance of certain *quasi* public duties, and in construing the provisions of the ordinance, its terms must be considered in the light of this purpose. When so considered the right to use the street of the city as provided for in the ordinance, must be regarded from the standpoint of the Mayor and Council in passing it, which was the inauguration and promotion of a public rather than a private enterprise.

We confidently challenge the assertion of the Court that the perpetual feature of this ordinance was "so important and valuable a feature of the contract as to irresistibly lead the contracting parties to mention it specifically if they intended to provide for it." That the perpetual feature of the ordinance was of *some* importance and value at the time the ordinance was passed may be admitted. But that that feature was important and valuable to the extent indicated in the court's opinion is unjustified by any fact in the record. It must be borne in mind that at the time of the passage of Ordinance 826, the establishment and operation of an electric light system in the City of Omaha, involving the expenditure of over one and one-half millions of dollars, might or might not prove to be a profitable enterprise. The electric light business was then in its infancy. It is fair to assume that the Mayor and City Council made as favorable a contract as was possible under the conditions as they existed at the time of the grant, and that the failure to limit the duration of the grant was in necessary recognition of the fact that in order to secure the performance of the public service of furnishing electric current for

public uses, it was essential that the grant be unlimited in duration in order to induce the investment of the large amount of capital that would be required under conditions involving great business risk. It must be remembered that conditions then were very different from what they are now. After the lapse of a quarter of a century, during which the city has grown in population and in industries to an extent that was unknown and unknowable in 1884, and after the expenditure of millions of dollars in developing and equipping the electric light plant and after many and great improvements have been made in the methods of generating and transporting and utilizing electric current, the perpetual feature of the existing franchise, license or right may well be held to be "important and valuable." But nothing could be more unjustifiable than to gauge the purpose and intent of the Mayor and City Council in the year 1884 by the importance and value of that feature of the grant as it exists at the present time.

But, irrespective of any question of fact referred to by the Court of Appeals, the conclusion of law that the contracting parties would have specifically mentioned the perpetual feature of the right conferred by the ordinance if they had intended to provide for it, is unsound in reasoning and unsupported by the authorities. As a matter of law, the converse of this proposition is true. The rule is that:

A MUNICIPAL GRANT OF A FRANCHISE, LICENSE OF RIGHT OF WAY IN THE STREETS, FOR THE PURPOSE OF SECURING TO THE CITY THE PERFORMANCE OF A PUBLIC SERVICE, IN THE ABSENCE OF A SPECIFIC LIMITATION AS TO TIME, WILL BE PRESUMED TO BE UNLIMITED IN DURATION.

In *Nebraska Telephone Company vs. City of Fremont, supra*, it will be observed that no language is found specifically conferring a perpetual right. The holding of the Circuit Court of Appeals of which we now complain, that the granting ordinance in the present action did not confer a perpetual right because the contracting parties did not specifically declare therein that the right granted was to be perpetual would apply just as much to the granting ordinance in *Telephone Company vs. Fremont*, and if the Court's conclusion is true with reference to the present suit, it must have been true with reference to that suit. But the Supreme Court of Nebraska in the *Nebraska Telephone Company* case, holds that by the terms of the ordinance, there was a grant to the association in perpetuity of a right of way or easement over all its public ways without restriction or limitation, and for that reason the Nebraska Supreme Court enjoined the enforcement of a subsequent ordinance requiring the removal from the streets of the poles and wires of the telephone company.

In the *City of Plattsmouth vs. Nebraska Telephone Company, supra*, we again have an ordinance that fails to specifically authorize or grant a perpetual franchise or license. The Supreme Court of Nebraska in its opinion in the *Plattsmouth Telephone* case does not, in specific terms, adjudge that the right or franchise conferred was perpetual, but in substance and effect, it is so declared

when the Court adjudges that the rights granted were inviolable and beyond the power of the city to afterwards lessen by the imposition of conditions and burdens not embodied in the granting ordinance.

In the *City of Seattle vs. The Columbia Railway Company*, supra, (6 Wash. 379; 33 Pac. 1048), the grant of a right of way over the streets of the city was not declared in the ordinance to be perpetual, or for any designated period of time, but the court holds that:

"Property rights acquired under and by virtue of franchises thus granted are perpetual unless otherwise limited in the grant."

In *City of New Orleans vs. Great Southern Telephone Company*, supra, (40 La. Ann. 41), the granting ordinance provided as follows:

"Section 1. Be it ordained by the city council of the city of New Orleans, that the New Orleans Telephonic Exchange is hereby authorized to construct and maintain a line or lines of telegraphs through the streets of this city, the line or lines to be constructed along such streets, at such points, and in such manner, as to the kind and position of the telegraph poles, the height of the wires above the streets, and in all other particulars, as the administrator of the department of improvements of this city may direct."

Here again there is no specification of the granting of a perpetual or irrevocable franchise or right, but the Court holds in effect that such a perpetual franchise was granted by enjoining the enforcement of a subsequent ordinance imposing additional burdens upon the telephone company.

The holding in *Michigan Telephone Company vs. City of St. Joseph*, supra, (121 Mich. 502; 80 N. W. 383) is to the same effect, as is also the holding in *Northwes-*

tern Telephone Company vs. City of Minneapolis, supra. In the latter case the granting ordinance provides that the Telephone Company—

“is hereby authorized to erect, establish, and maintain within the limits of the city of Minneapolis telephone poles, and to stretch and maintain thereon the necessary wires for a telephone exchange system, according to the conditions hereinafter stated.”

which, of course, contains no specification as to the period of the franchise, and makes no mention of any perpetual right, and yet, as we have seen, the Court in that case, adjudges the right to be unlimited in duration when it enjoins the enforcement of a subsequent ordinance ordering the removal of the telephone company's wires and poles from the streets of the city.

In *Board of Morristown vs. East Tennessee Telephone Co.*, supra, (115 Fed. 304) the Circuit Court of Appeals of the Sixth Circuit placed the same construction upon an ordinance granting the telephone company the right to erect poles and string wires on the streets and alleys of the city and say:

“The consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system, was an easement in the streets and a conveyance of an estate of property interest which . . . was irrevocable after acceptance, unless power to alter or revoke was reserved. This principle has too many times been declared and applied by this Court to require further elaboration.” (p. 307.)

In considering this question in *East Tennessee Telephone Company vs. Frankfort*, supra, (190 Fed. 347) wherein the city contended that a grant to the Telephone Company of the right to use the streets and alleys of the city under an ordinance which did not specifically desig-

nate the term of the grant, constituted a mere license revocable at the will of the city, the Court says:

"The disposition of the motion hangs on the question whether first the grant of April 11, 1881, was the grant of a mere license revocable by the city at will, or of an irrevocable and perpetual right to maintain and operate a telephone line on and over the streets of the city, and then, if it be held to be a mere license, whether it was revocable after the licensee and plaintiff had expended \$90,000 in erecting the line. The language of the grant is that the petition for "permission . . . to erect telephone poles in different streets of the city and to carry it across the city bridge was presented and granted." The permission granted in words went no further than to erect telephone poles on the streets and to carry it across the city bridge. It will not be disputed that it also included permission to stretch wires on those poles, and not only to erect the poles and stretch the wires, but to maintain and operate the line after it had been erected. All this at least was involved in the grant. The defendants' position then amounts to this: That it was the thought and intent of the parties to the grant that the grantee could expend \$90,000 in erecting a line thereunder, and immediately after its erection the defendant city could revoke the grant, and upon 90 days' notice could compel the grantee to remove its line from the streets. If it can do so after the lapse of 30 years, it could have done so immediately after the erection and putting in operation of the line. In construing the grant one has to be on his guard against allowing the policy of the state as evidenced by its present Constitution and laws to affect his judgment. It is its policy now that no such privilege shall be given away under any conditions. It shall only be sold to the highest bidder and that for a limited period of time, not exceeding 20 years. When this grant was made, no such policy was in existence. This circumstance has a bearing upon the construction of the grant. It has what has been

termed "a contemporary equation." It contains "a standpoint as well as a subject." In ascertaining its meaning, therefore, one must transport himself to those days and look at it through their eyes. I think that it must be conceded on all hands that these general considerations applicable to a determination of the question are sound."

In *People vs. O'Brien*, (111 N. Y. 1), the Broadway Surface Railroad Company was incorporated under a general statute for a term of 1000 years. Having obtained the consent of the city to use of certain city streets for the operation of a certain surface railway, the company proceeded to the building and operation of a street railway. Subsequently the legislature passed an act repealing its charter and annulling and dissolving the corporation. It was contended by the state that the franchise of the corporation was a mere license or privilege, enjoyable during the life of the corporation only and revocable at the will of the city. The Court held that while the annulling act was constitutional, its only effect was to destroy the corporate life and did not apply to or affect the property rights of the corporation, and that subsequent legislation which sought to take away from the company its street franchise was unconstitutional.

In commenting on this decision Judge Dillon, in the recent revision of his work on *Municipal Corporations*, (5th Ed. Vol. 3, p. 2052, sec. 1265.)

"It is to be observed of this case that the franchise or right granted to the Broadway Surface Railroad Company did not in its nature and terms differ materially from the innumerable indeterminate franchises which have been granted to public service corporations in other states, nor do the laws of New York giving these franchises and rights the attributes of property appear to differ materially

from those to be found in other jurisdictions.
 • • • The rules laid down in the decision are of great and lasting importance, both to the public and to investors, and seem to the author to be founded upon principles of justice and right. The grant to the railway company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the Court was in accord with the general understanding. *In the absence of language expressly limiting the estate or right of the company, we think the court correctly held under the legislation and facts that the right created by the grant of the franchise was perpetual, and not for a limited term only. No other view is consistent with the long line of decisions to the effect that such rights are property rights which cannot be destroyed or impaired by legislative enactment. These decisions have been rendered upon the assumption that when the grant has been made by legislative authority and accepted and acted upon, it is beyond recall, and except as it is subject to the exercise of the police power, cannot thereafter be impaired by legislative enactment.*"

The decision in *People vs. O'Brien* was cited with approval by this Court in *Detroit Citizens Street Railway Company vs. Detroit*, (184 U. S. 368-395) where the question was as to whether the grant of a franchise to use the streets of a city may extend beyond the life of the corporation to which the grant passes. The Court says:

"Where the grant to a corporation of the franchise to construct and operate its road in the streets of a city, is not by its terms limited and revocable, the grant is in fee vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad. (p. 395.)

In *Louisville vs. Cumberland Telephone Company*, supra (224 U. S. 649), the City Council of the City of Louisville by ordinance ratified and confirmed to the Ohio Valley Telephone Company, its successors and assigns the rights granted under a statute providing that—

“The said company may construct, equip and maintain said telephone systems and exchanges, erect poles and string wires thereon and operate its telephone lines, over, along or under any highway, street or alley in the City of Louisville with and by the consent of the general council of said city.”

and the rights thus conferred were subsequently assigned to the Cumberland Company.

In enjoining the enforcement of an ordinance which undertook to repeal the rights thus granted this court said:

“The plaintiff in error makes the further contention that its general demurrer should have been sustained and the bill dismissed because the original grant of street rights, having been indefinite as to time, was either void ab initio, or revocable at the will of the General Council, or that it expired in 1893 when (Ky. Stat., 1909, Sec. 2742) Louisville was made a city of the first class with new and enlarged powers. (p. 662). * * *

In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will

of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the City of Louisville. Such has been the uniform holding of courts construing similar grants to like corporations. *Milhan vs. Sharp*, 27 N. Y. 611 (1863), *Hudson Telephone Co. vs. Jersey City*, 49 N. J. L. 303; *Mobile vs. L. & N. R. R.*, 84 Alabama, 122; *Seattle vs. Columbia & P. S. R. R.*, 6 Washington, 379, 392; *People vs. Deehan*, 153 N. Y. 528. The earlier cases are reviewed in *Detroit St. R. R. vs. Detroit*, 64 Fed. Rep. 628, 634, which was cited with approval in *Detroit vs. Detroit St. R. R.*, 184 U. S. 368, 395, this Court there saying that "*Where the grant to a corporation of a franchise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee.*" (p. 663.)

THE PROVISIONS OF THE GRANTING ORDINANCE REQUIRING THE REMOVAL FROM THE STREETS OF ALL TELEGRAPH, TELEPHONE OR ELECTRIC POLES OR WIRES WHENEVER THE CITY COUNCIL SHALL, BY ORDINANCE, DECLARE THE NECESSITY THEREFOR, WAS NOT INTENDED TO LIMIT THE TERM OF ENJOYMENT, BUT TO REQUIRE THE PLACING OF ALL WIRES UNDERGROUND, WHEN NECESSARY.

In support of the conclusion announced by the Circuit Court of Appeals it is argued in the opinion of Judge Adams, that:

"The ordinance actually reserved to the city the right to require the removal of the poles and wires from the streets within sixty days after the City Council should declare the necessity therefor by ordinance. This is not only inconsistent with it, but seems quite repugnant to the claim of perpetuity now made by the company." (Record p. 121.)

The conclusion here announced is clearly untenable. The provisions of the ordinance requiring the removal of the poles and wires on sixty days' notice is no more inconsistent with and repugnant to the claim of perpetuity than it is inconsistent with and repugnant to the finding of the court that the franchise was for a twenty-year period. The granting ordinance provides as follows:

"Section 1. That the New Omaha Thomson-Houston Electric Light Company, or assigns, is hereby granted the right of way for erection and maintenance of poles and wires, with all the appurtenances thereto, for the purpose of transacting general electric light business through, upon and over the streets, alleys and public grounds of the City of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance. Provided, that said company shall at all times, when so requested by the city authorities, permit their poles and fixtures to be used for the purpose of placing

and maintaining thereon any wires that may be necessary for the use of the fire department or police of the city; and provided further, such poles and wires shall be erected so as not to interfere with the ordinary travel through such streets and alleys; and provided, that whenever it shall be necessary for any person to move along or across any of said streets or alleys, any vehicle or structure of such height or size as to interfere with any of the wires so erected, the company operating such poles and wires shall, upon receiving twelve (12) hours' notice thereof, temporarily remove said poles and wires from such place as must necessarily be crossed by such vehicle or structure; and provided, further, that whenever the City Council shall, by ordinance, declare the necessity of removing from the public streets and alleys of the City of Omaha the telegraph, telephone or electric poles or wires thereon constructed or existing, said company shall, within sixty days (60) from the passage of such ordinance, remove all poles and wires from such streets and alleys by it constructed, used or operated." (Record pp. 2, 3.)

It is manifest that all of the provisos including the proviso referred to in the opinion of Judge Adams were intended to apply and do apply *during the life of the franchise*. The grant is made subject to those provisos and conditions and to all of them, and just as much subject to one as to another. It is impossible under any reasonable construction of the section quoted to maintain that any of the provisos in question were intended to apply to conditions existing subsequent to the determination of the grant.

The Circuit Court of Appeals construed the last mentioned proviso as a condition reserving in the city the absolute power to terminate the rights conferred under the grant on sixty days' notice. Otherwise there can be no possible force in the argument that the clause

in question is inconsistent with a perpetual grant. Under such an interpretation the inconsistency is just as great during a twenty-year period as during a perpetual period. It is impossible to believe that it was the intention that the right to use the streets and alleys for an electric light business should be granted; that the company under the grant should expend the vast sum of money necessary to establish this plant and that thereafter at any time during the life of the grant on sixty days' notice, the company should be required to remove its poles and wires from the street, have its business terminated and be thereafter deprived of all rights under its grant—and this whether the period was twenty years, or one hundred years or perpetual. The implication in the opinion of Judge Adams that the proviso quoted by him meant a reservation to the city of the authority to terminate the use of the streets and thereby to terminate the franchise or rights of the Electric Company is unreasonable because it is inconsistent with the grant itself and impossible of application consistently with the rights vested in the company under the terms of the ordinance in which it appears.

We submit that the proviso in question was intended to reserve in the city the authority to compel the grantee to remove its poles and wires from the streets and put its wires underground whenever the development of the city should require such action to be taken. This is the natural and reasonable construction of the language and its correctness is demonstrated by the fact that the proviso in question refers not merely to electric poles and wires but to telegraph and telephone poles and wires, with which latter the grantee under this ordinance had no connection. The reference to the

telephone and telegraph wires and poles is clear evidence of the purpose of the city to retain the power to cause the removal from the streets and alleys of *all* wires and poles used by any public service corporation, not with a view of terminating the service of transmitting messages by telephone or by telegraph, nor of terminating the service of transmitting electric current, but for the purpose of freeing the streets within such district as might from time to time become necessary, of the superstructures used for the several designated purposes.

THERE WAS NO INTENTION TO LIMIT THE GRANT TO THE TWENTY-YEAR PERIOD AFTERWARDS PROVIDED IN THE ARTICLES OF INCORPORATION OF THE THOMSON-HOUSTON COMPANY FOR THE TERM OF EXISTENCE OF THAT COMPANY.

In the opinion of Judge Adams, it further stated that

"In view of the foregoing disclosing that no perpetual franchise was intended and pointing to the improbability of the Company embarking upon the business without some assurance of extended enjoyment, we think the fact that the corporate life of the Company continued for a period of twenty years, affords a key to the true intention of the parties. It is improbable that the Mayor and City Council with due regard to the rights of the inhabitants of the city would tie their own hands as well as that of all future councils and mayors, by granting a perpetual franchise to a company whose corporate life rendered it certain that it could not discharge its duties more than twenty years and with no obligation upon it at the end of its life to assign its rights to another person or corporation empowered or obligated to accept the grant and perform the desired service." (Record p. 121.)

This conclusion is not predicated upon any fact tending to show an expressed intention to limit the term to twenty years. *The granting ordinance was passed about one year before the company was organized* and there is no fact in the record tending to show that the city, or anyone else then knew that the company would be incorporated for that period. It cannot be said, therefore, that at the time the ordinance was passed it was in the contemplation of the city that the grant was to a corporation whose existence was to be limited to the period of twenty years, in other words, *the twenty-year period was not in consideration at the time the ordinance was enacted*. The twenty-year period was never at any time mentioned by the city or any of its officials in any ordinance, resolution, communication, or document of any kind, or in any other way, and was never thought of until it occurred to the learned counsel of the city as a possible defense to this action; it did not even occur to the counsel until after the filing of the answer, for one may search that pleading in vain to discover any intimation that it had ever occurred to anyone that the franchise or right granted in 1884 was limited to the twenty-year period of the life of the company. On the contrary the answer alleges in substance that it was the purpose and intention either to grant a mere license without duration revocable at the will of the city or a perpetual franchise.

"Defendants further allege that Ordinance No. 826 and Ordinance No. 4569, amendatory thereof, constituted mere licenses revocable at the will of the defendant city, and that at the time said ordinance was passed in 1884 the Mayor and City Council had no power, right or authority to grant a perpetual franchise to use and occupy the streets of said city and that if said ordinance or ordinances constituted

or were intended to grant a franchise, they and each of them, were void as being against public policy, said alleged franchises being without any provision for compensation to said city and were therefore against the public policy of the state; that said Mayor and City Council were prohibited by the laws, constitution and public policy of the state from granting a perpetual franchise in the streets of the city without providing for compensation to said city, and that said ordinances not constituting a franchise were mere licenses for the use and occupancy of the city streets. And defendants further allege that said concurrent resolution set forth in plaintiff's bill were intended as and constitutes a revocation of any permission that the plaintiff or its predecessors at any time possessed to occupy the streets, alleys or public grounds of said City of Omaha with poles, wires or conduits for the transmission of electric current for heat and power purposes. Defendants allege that plaintiff's bill is without equity and ought to be dismissed." (Record p. 26.)

The twenty-year period of the life of the company not having been in contemplation at the time of the passage of the granting ordinance and having never been in contemplation up to and including the time of the filing of the answer in the pending suit what possible justification can there be in this record for the holding of the Court of Appeals that—

"The fact that the corporate life of the company continued for a period of twenty years offers a key to the true intention of the parties."

The period of existence of a corporation, provided in the articles of incorporation, raises no presumption in law that the grant of a franchise, license or right is limited to that period.

Minneapolis v. Street Railway Co. (215 U. S. 430, 431).

Detroit v. Detroit Citizens' Street Ry. Co. (184 U. S. 393, 396).

Blair v. Chicago (201 U. S. 401).

In *Detroit v. Detroit Citizens' Street Railway Company*, supra, the ordinance had conferred certain franchise rights upon the Street Railway Company extending for a period of years beyond the life of the company. Mr. Justice Peckham in the opinion, says:

"No one contends that this extension of the term for the use of the streets of the city in any manner affected the limit of the term of the corporate life of the company, but the limitation of its life did not prevent it from taking franchises or other property, the title to which would not expire with the corporation itself. A corporation whose corporate existence was limited to a term of years could always purchase the fee in property which it needed for the operation of its business. If at the end of its term its life were not extended, the property which it owned was an asset payable to the shareholders after the payment of its debts, and in a case like the present, where the consent was assignable and transferable, particularly by virtue of section 15 of the street railway act above set forth, any company itself having corporate existence for that purpose, could purchase the outstanding term and operate its road thereunder. We see no reason why the company could not take the extended term as provided for in the ordinance, and it formed a good consideration for the agreement on the part of the company to perform the other obligations contained in the ordinance. This exact proposition has been determined by the Circuit Court of Appeals for the Sixth Circuit in *Detroit Citizens' Street Railway Company and others v. City of Detroit*, 12 C. C. A. 365; same case, 64 Fed. Rep. 628. In the course of the opinion of the court in that case, the cases of *People v. O'Brien*, 111 N. Y. 1, and *Miner v. New York Central Railroad Company*, 123 N. Y. 242,

were cited. *People v. O'Brien* is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to property necessary for its use, and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the right granted to be exercised by the corporation or whomsoever may lawfully succeed to such rights. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corporation. The other case in 123 N. Y. announces the same doctrine."

It is of the greatest importance that this grant was made to the Electric Light Company *and its assigns* without restriction. These are clear and express words of perpetuity and embrace all those persons and corporations who might take immediately or remotely from the grantee. Their meaning and legal effect in a grant are not debatable. They comprehend not merely a single person but a line of succession of persons in perpetuity—or until succession fails.

Cumberland v. Graves (7 N. Y. 311).

Bennington Iron Co. v. Rutherford (N. J. Law 164).

Where there is an entire absence of all words of assignment or other words of perpetuity, it might well be argued that the grant was made in reliance upon the character of that particular corporation, and upon its especial fitness to perform the duties that would devolve upon it as a public service corporation, and that such a

grant being limited to that particular corporation, was not intended to extend beyond the term of its life. But this reasoning cannot apply in any degree where the grant is to a designated corporation *and its assigns*, because there can be no intention to rely solely upon the designated corporation as to the performance of its duties to the public, since the company is, in the ordinance itself, specifically authorized to transfer those duties by assignment to any successor it may see fit to designate.

The Circuit Court of Appeals, in support of its view that the life of the ordinance-contract should be held to be limited to the corporate life of the Company, notwithstanding that the grant was made to it or assigns, refers to five cases, viz:

Turnpike Co. v. Illinois, 96 U. S. 63.

Wyandotte Electric Light Co. v. Wyandotte, 124 Mich. 43.

Blair v. Chicago, 201 U. S. 400.

City of Rock Island v. Telephone Co., 132 Ill., App. 248.

Virginia Canon Toll Road Co. v. People, 22 Col. 429.

An analysis of these cases shows that they do not sustain the proposition for which they are cited.

In *Turnpike Co. v. Illinois* the right or franchise to take tolls was conferred in and by the same special act of the legislature that created the corporation itself and limited its duration to twenty-five years. It was not a case where a corporation already existing received for itself and its assigns something in virtue of a grant made independently of and subsequently to the creation of the company, nor was there any grant made in terms to the

company and its assigns. In these circumstances it was rightly held as a matter of construction that the franchise was merely co-extensive with the life of the company.

Wyandotte Electric Light Co. v. Wyandotte contains a *dictum* to the effect that if a company organized under a general law relating to "electric light companies" which gave to such companies the right, with the consent of a municipality, to construct and maintain in the public streets thereof conductors for distributing electricity, should receive such consent, there would arise therefrom a contract binding for the life of the corporation. "It would be immaterial that no time for the existence of the right or franchise was specified. The grant in such case would be limited to the period of existence fixed by the charter." The law would imply, the court says, that both parties contracted with reference to the corporate life of the company. Here again the street rights would be obtained in virtue of the act of incorporation, the act of the municipality being merely the performance of a condition necessary to be performed before the direct legislative grant took effect. The situation could not afford an opportunity to the city to confer a franchise for a period or on terms prescribed by it. In the *Wyandotte* case the company's charter had not expired, and all that was decided was that the city could not revoke a consent which it had given. What would be the result in a case where a franchise should be conferred, not by direct grant from the legislature but by the city in the exercise of a delegated power, and where the grant should be made to a company and its assigns, was not considered. Nor was there any occasion to consider whether in such circumstances there would be any difference in the result between a case where the grantee was a corporation of limited duration or one having a perpetual existence.

Blair v. Chicago was a case having its own particular circumstances which plainly showed a mutual understanding that the grant was limited to a specific term. The right granted to the company was that of extending its street railway tracks, the same to be constructed and operated as a part of an already existing system; and as it plainly appeared that the franchise for the maintenance and operation of the existing system was limited to a term of years, it was obvious that the new grant, construed in the light of these facts, should be held to be correspondingly limited.

In *City of Rock Island v. Telephone Company*, there is a dictum to the effect that where a franchise is granted by a municipality in general terms to a corporation whose existence is limited to a definite period, the granting ordinance should be construed as expiring at the same time. It was not, however, necessary to a decision of the case to hold more than that the ordinance involved therein could not meanwhile be repealed. The grant had not been made to the company and its assigns.

In *Virginia Canon Toll Road Company v. People*, a turnpike corporation had been organized under a general law with its life limited to twenty years. Its right to take tolls was part of the power conferred by the law under which the organization was effected. The case did not present the feature of a subsequent grant made by the municipality itself, nor was there any reference to the company's "assigns." On the lapse of the twenty-year period a new corporation, which had been organized under a different law and which in itself had no franchise to take tolls, purchased the original company's property and claimed that in virtue of the acquisition thereof it could go on exercising the franchise to take tolls. It was, of course, held that it could not do so.

If the cases referred to sustained the proposition of Judge Adams, then the length of a franchise in a case like the present one would be made to depend upon the period which the promoters of a company might happen to choose for its corporate life. Had the organizers in this case seen fit to name 999 years as the length of the period, then it would have followed that the franchise now in litigation would have been deemed to be granted for that number of years. Obviously it is unsound in principle to allow the construction of a franchise-granting ordinance to depend upon the subsequent action of the grantee taken voluntarily and without any participation on the part of the City.

In determining questions as to the assignability of franchises of public and *quasi-public* corporations and their duration, courts have sometimes said that the legislature must be supposed to have relied upon the character and responsibility of the particular corporation to which the privileges were granted; and accordingly decisions have been influenced by this consideration. That this idea, however, is unsound in principle as applied to corporations organized under general laws is clearly shown in a very able opinion by the Supreme Court of New Hampshire in

American Loan & Trust Co. v. General Electric Company, 71 N. H. 192.

In that case, at page 199, the court said:

"One reason that has been assigned for the non-vendibility of a *quasi-public* corporation's franchises and property, without the special assent of the legislature, is that the state, in granting the corporate powers, relies more or less upon the ability and character of the persons to whom the grant was made for accomplishing the public purposes in view. If this is a sound reason in any case *Shepley v. Railroad*,

55 Me. 395, 407; *Miller v. Railroad*, 36 Vt. 452, 492; 4 Thomp. Corp., s. 5352), it certainly is not in the case of a corporation formed under the general law of this state. The state has no part in determining who the members of the corporation shall be, other than that they shall be of lawful age. Any five persons of lawful age may become a corporation by force of their own acts in making the agreement, causing it to be recorded, and paying the required charter fee. After the corporation is organized and its capital stock is paid in, the stockholders are liable to constant change by transfers of stock in various ways. The grant of corporate powers under these circumstances is not in any sense a personal trust. *Threadgill v. Pumphrey*, 37 Tex. 573, 578."

THE FRANCHISE UNDER CONSIDERATION IS NOT SUBJECT TO THE OBJECTION THAT IT IS INIMICAL TO THE PROVISIONS OF SECTION 16, OF ARTICLE I OF THE NEBRASKA CONSTITUTION.

As a further objection to the authority of the city to grant the appellant company a franchise or right unlimited as to duration, it was urged in the lower court that such a grant violates the provision of Section 16, Article I, of the Nebraska Constitution, which declares that "no * * law * * making any irrevocable grant of special privileges or immunities shall be passed."

This contention is disposed of by the fact that the constitutional provision in question has been directly construed by the Nebraska Supreme Court in *Plattsmouth v. Nebraska Telephone Company* (*supra*) where it is held that a contract or grant, such as was conferred upon the Electric Light Company by Ordinance No. 826, *not being exclusive* in its character, is not the grant of any special privilege or immunity.

The Court in the opinion in that case, says:

"The argument upon which it attempts to maintain the validity of the statute is as follows: Section

15, Article III of our constitution, prohibits the legislature from passing local or special laws granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever; and it is said that the legislature cannot delegate to a municipality a power which it cannot itself exercise. It is claimed that the ordinance in question is an attempt to grant to the defendant a special privilege or franchise, and that this is beyond the power of the municipal authorities. If we should concede (which we do not) that a general law, granting to cities and towns the powers which are usually found in their charters, did not confer upon such municipalities the power to pass and enforce special ordinances suited to their local conditions, still the ordinance in question is not subject to the criticism made upon it. A special privilege in constitutional law is a right, power, franchise, immunity or privilege granted to, or vested in, a person or class of persons to the exclusion of others and in derogation of common right. *Guthrie Daily Leader v. Cameron* (3 Okla. 677, 41. Pac. 635.) In *City of Elk Point v. Vaughn* (1 Dak. 113, 46 N. W. 577), it was held that the act of Congress of March 2, 1867, providing that the legislative assemblies of the several territories shall not grant any special privileges, refers to the granting of monopolies such as ferries, trade-marks, or the exclusive right to manufacture certain articles or to carry on a certain business in a particular locality, to the exclusion of others, and does not include the granting of a public charter to a municipal corporation. Ordinance No. 91 does not attempt to confer upon the defendant any exclusive right or franchise, and leaves it open for the city, at any time, to extend to other companies or corporations the same privileges awarded to the defendant. The contention, therefore, that ordinance No. 91 is void and confers no right upon the defendant cannot be sustained." (pp. 464-5).

The Circuit Court of Appeals of the Eighth Circuit

considered this constitutional provision in *Omaha Water Company v. City of Omaha* (147 Fed. 1):

"Neither the power of a municipality to contract with a third party for the construction and operation of water-works, street railways, or other public utilities, nor the right of such a third party under such a contract, constitutes a special privilege or immunity within the meaning of those terms in Section 16, Article I of the Constitution of Nebraska, which prohibits the legislature from 'making any irrevocable grant of special privileges or immunities.' " (Syl.)

That the right granted under Ordinance No. 826 was not the grant of a "special privilege" was decided by this Court in *Louisville v. Cumberland Telephone Company*, supra (224 U. S. 649):

"In 1891 a new constitution was adopted by the State of Kentucky, conferring upon municipalities the right to grant street franchises, and later, under the reserve power, a statute was passed repealing all special corporate privileges. It is claimed that in consequence of these laws the street rights granted the Ohio Valley Telephone Company have been withdrawn, or at least made subject to municipal revocation. But we find in the cited sections of the constitution (156, 163, 164 and 199) and the statutes (Secs. 573, 2742, 2783 and 2825) nothing which sustains this contention, which, if correct, would lead to the conclusion that all structures, theretofore lawfully placed in the city streets by water, light, telephone, railway and other public utility companies became nuisances, and as such were removable after September, 1898, to the damage of the community at large and the destruction of property of immense value dedicated to public purposes. The general repeal of all special privileges, referred to in the statute, related to exclusive grants, tax exemptions, monopolies and similar immunities (Ky. Stat. 573; *Covington v. Kentucky*, 173 U. S. 231), and not to those corporate powers and property rights needed

and conferred in order to enable the company to perform the duties for which it had been organized. (p. 659).

In this connection it may be observed that if the granting ordinance were objectionable to the constitutional provisions referred to, that objection would be equally forceful whether the grant were for twenty years or a hundred years or for an unlimited period. The constitutional prohibition is not against granting an irrevocable perpetual privilege but against granting an irrevocable privilege, and a privilege for twenty years or for any definite period, if valid for that time, is just as irrevocable as a privilege granted with no limit as to time.

If the proposition contended for by the city is sound, it would be impossible for a municipal corporation to control its streets, any provisions for street railways, gaspipes, waterpipes, railways, viaducts, subways, telephone, telegraph, electric lines and the like, would be required to be general as to all persons who should see fit to avail themselves of the grant and would have to be subject to revocation at any time at the will of the city. Such conditions would render impossible the development of cities and the conduct of municipal affairs.

THE DEFENDANT CITY AND THE ELECTRIC LIGHT COMPANIES HAVE ALWAYS BY THEIR ACTS CONSTRUED THE GRANTING ORDINANCE TO HAVE CONFERRED A PERPETUAL FRANCHISE, PRIVILEGE OR RIGHT, AND NOT A FRANCHISE FOR A TWENTY-YEAR PERIOD NOR A LICENSE AT THE WILL OF THE CITY, AND THE CITY IS NOW BOUND BY THAT PRACTICAL CONSTRUCTION.

The contention by the city that the grant to the New Omaha Thomson-Houston Electric Light Company was

a mere license for a twenty-year period or for no period at all and revocable at the will of the city is an afterthought. That construction was not in the minds of anyone at the time of the enactment of the granting ordinance. It had never been suggested or hinted at from the time of the enactment of that ordinance in 1884 to the time of the filing of the answer in the pending litigation. It was not even thought of by the governing body when concurrent resolution No. 2330 was passed, for it is impossible to believe that with such a claim in mind, the city would have undertaken to enforce its alleged rights merely to the extent of prohibiting the company from transmitting electric current to those consumers who used it in the production of heat and power, and leave the company free to continue the use of the streets in the same manner for the transmission and sale of current to all consumers using it for light.

The city has permitted and encouraged the expenditure by the appellant company and its predecessor in interest of millions of dollars without the slightest protest, declaration or intimation that the city claimed the rights granted to have been limited to a period of twenty years, or that the same constituted a mere revocable license, without duration, terminable at the will of the city. Throughout this period of nearly a quarter of a century the city well knew that the company was expending this large sum of money and establishing a permanent system for furnishing electric current to the city and its inhabitants under the belief that it was thus equipping itself for furnishing this public service to the advantage of the public and to its own profit under a franchise unlimited as to time.

The record discloses that on December 13th, 1904,

within nine months of the expiration of the twenty-year period of the life of the New Omaha Thomson-Houston Electric Light Company, and, consequently, *within nine months of the time of expiration of the franchise and rights of the Electric Light Company according to the opinion of the Court of Appeals*, the Mayor and City Council passed ordinance No. 5433, by the terms of which the Electric Light Company was required to place its wires and cables underground within a designated district. (Record p. 98.) The Electric Light Company was in no way notified or advised, at the time of the passage of that ordinance, of any claim on the part of the city that the franchise and rights of the Electric Light Company were about to terminate. In compliance with the requirements of that ordinance the Electric Light Company placed its wires and cables in underground conduits at an expenditure, as shown by the record, of over \$400,000. At no time while this change was being made and this great expenditure of money incurred, was there any intimation on the part of the city that it claimed or intended to assert, that the franchise and rights of the Electric Light Company were about to terminate. It is inconceivable that the city on the one hand would have required, or that the Electric Light Company on the other hand would have complied with a requirement that it should expend \$400,000 in thus establishing permanent underground conduits, and thus permanently equip itself for the transaction of future business and for the future performance of a public service, if at the time, either the city or the company believed that the franchise and rights of the company were about to terminate, or that the company was a mere licensee at the will of the city, and as such might

be required to remove its property from the streets and the public places of the city and to terminate its business at any time on notification by the city.

Municipal corporations do not always observe the highest standards of business integrity, but it is impossible to believe that the City of Omaha would have committed this monstrous wrong or that the Company would have voluntarily submitted to it if it had been supposed by either that the franchise was about to expire or could be terminated at any time.

In April, 1905, the City and the Electric Light Company entered into a written contract by the terms of which the Company contracted to furnish light to the streets, alleys and public grounds and buildings of the City of Omaha under specified terms and conditions for a period of five years, terminating on the 31st day of December, 1909. The Company contracted to furnish and the City to pay for 600 arc lights for the lighting of the streets and alleys of the city, and also to furnish electric lights for the city hall and other public buildings belonging to the city, the contract making specific stipulations as to the excavations in streets and the erection of poles and wires, and the laying of underground conduits and the making of all repairs thereon. (Record, p. 13.) This contract was entered into less than six months before the time when, according to the opinion of the Court of Appeals, the rights of the Electric Light Company would terminate because of the expiration of the life of the New Omaha Thomson-Houston Electric Light Company, on September 26th, 1905.

The City gave no information or intimation that it intended to assert that the rights of the Electric Light Company would terminate in less than six months from

the time of entering into this contract. It is impossible to believe that either of the parties would have entered into that contract if, at the time, either had construed the granting ordinance as conferring rights that would terminate within six months, or as conferring a mere license terminable at any time at the will of the city. *This contract was in full force and effect and had more than eighteen months yet to run at the time the concurrent resolution No. 2330 was passed, and had more than fourteen months still to run at the time of the institution of this action.*

In this contract it was further agreed by the parties that until December 31st, 1909, the Electric Light Company should pay to the city an amount equal to three per cent of its gross revenue. This provision in the contract had been complied with by the Electric Light Company and was being complied with at the time of the passage of the concurrent resolution. If there were nothing in the contract but this provision regarding the payment of royalty (which the record shows amounted to more than \$13,000 in the year 1907) that alone would preclude the belief that either the city or the company at the time of entering into that contract, construed the granting ordinance as conferring rights that would terminate during the first year of the five-year period provided for in the contract; much less that the company was operating under a mere license revocable at any time at the will of the city.

The uniform and long continued practical construction thus given to the granting franchise by the city and company constitute an authoritative interpretation which the courts will accept and apply. As was said in *Chicago, Great Western Railway Company v. Northern*

Pacific Railway Company (101 Fed. 792), "it is a canon in the interpretation of contracts that the practice of the parties under them may furnish a solid basis on which their construction may rest. 'Tell me,' says Lord Chancellor Sudgen, 'what you have done under a deed, and I will tell you what that deed means.' *Attorney General v. Drummond* (1 Dru. & Wal. 353, 366), affirmed on appeal in *Drummond v. Attorney General*, 2 H. L. Cas. 837. This remark of the Lord Chancellor has come to be accepted as a maxim in the construction of contracts." This Court in *Insurance Company v. Dutcher* (95 U. S. 273) said: "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done," and in *United States v. Moore* (95 U. S. 763), "the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and should not be overruled without cogent reasons." Again in *United States v. Hill* (120 U. S. 180), in considering the question as to what fees were intended by the language of a certain statute, Mr. Justice Blatchford, in giving effect to the interpretation that had been placed upon it by judges, heads of departments and governing officers, said, "this construction of the statute in practice concurred in by all the departments of government and continued for so many years must be regarded as absolutely conclusive in its effect."

The Supreme Court of Nebraska announced this principle in *State v. Board of County Commissioners* (60 Neb. 566-572), wherein the question arose as to whether

a certain contract to furnish a clock for the county court house was the contract of the clock company or of the agent of the company who signed it merely in his individual capacity. In determining the question according to the construction previously placed upon the contract by the parties, the Court said: "Where both parties to a contract, with knowledge of its terms, by their action under it have given it the same construction, it is generally a safe rule to adopt such construction." (Citing authorities.)

Judge Sanborn in announcing the opinion of the Circuit Court of Appeals of the Eighth Circuit in *Manhattan Life Insurance Company v. Wright* (126 Fed. 82) wherein the question at issue was as to whether a note given by a beneficiary to an insurance company constituted a loan of money by the company and a payment of the premium on a policy, or a mere postponement of the payment of the premium, states:

"The practical interpretation given to their contracts by the parties to them, while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious error." (Cases cited.)

In the *City of New Orleans v. Great Southern Telephone Company*, supra (40 La. Ann. 41; 8 Am. St. Rep. 505) in denying the contention of the city that the Telephone Company was not possessed of an irrevocable contract but of a mere license at the will of the city under an ordinance which provided "that all the acts and doings of said company under this ordinance shall be subject to any ordinance or ordinances that may here-

after be passed by the city council concerning the same," the Court says:

"The city's construction of this section is strained and unreasonable, and conforms neither to its spirit or letter. It is not conceivable that the grantee would have invested its means in such an enterprise, had it imagined that the term and conditions of its enjoyment of the privilege lay at the entire mercy of the city. If any such unreasonable intention lurked in the minds of the council which passed the ordinance, the grantor, under familiar rules of construction, came under the obligation of expressing it clearly and unambiguously."

The language of the Court in *Commercial Electric Light Company v. City of Tacoma*, supra (17 Wash. 661) is peculiarly applicable to the facts in the present case.

"It is further urged on behalf of the appellants that the contract to maintain wires upon the poles of the Tacoma Light & Water Company amounted to a mere license revocable at will, and that such license was revoked ipso facto by the selling of the light plant to the city. But, conceding that to be true, it nevertheless plainly appears that the city continued to enjoy the benefits accruing from that contract up to the very time this action was instituted; for until that time, it left its own wires upon the poles of the respondent, just as they were when the sale was accomplished, and on June 30, 1895, it demanded and received from respondent 'rental' for the use of its poles at the contract price. It cannot be permitted to accept and enjoy the fruits of the contract, and at the same time deny its existence or claim that it was revoked."

In *Irwin v. United States* (16 How. 513) the United States acquired the right, by deed, to one-half of the water from a common source of supply. Irwin, a junior purchaser from the common grantor, had the right to the

remaining one-half. The deed to the United States provided that it should have the right to take so much water as would "pass through a pipe or tube of equal diameter with one which conveys the water from the same spring upon the same level therewith," to the premises of Irwin. The point of consumption by the United States was four times as far from the spring as the point of consumption by Irwin, and, consequently, if the United States had carried the water the whole distance through a pipe of the same capacity as that at the head, it would have received only about one-sixteenth of the water. For more than sixteen years the United States has taken its water through a pipe which, at its head, was of the same capacity as that which supplied Irwin, but which, at a point a few inches away, was increased in capacity, all with the knowledge and acquiescence of Irwin and his assignor. Irwin claimed that the United States should conduct its water to the point of consumption through a pipe of uniform capacity, and threatened to cut off the connection, whereupon the United States instituted the suit for injunction. It was said in the opinion (p. 523):

"If the deed (to the United States) were ambiguous, and capable of construction which would permit one party to over-reach and defraud the other, if there were no such rule of law as that which gives a construction to a deed most favorable to the grantee; yet we have here a practical construction by the vendor and vendee, made on the ground, and acquired in for sixteen years. * * * We are of the opinion, therefore, * * * that, assuming the deed to be capable of the construction contended for, the parties to it have construed it honestly and correctly; and that this practical construction having been acquired in by all parties interested for sixteen years, is conclusive."

To the same effect are:

Chicago v. Selden (9 Wall. 54).

United States v. Burlington R. R. Co. (98 U. S. 341).

United States v. Peugh (99 U. S. 269).

Brown v. United States (113 U. S. 570).

Toppliff v. Toppliff (122 U. S. 131).

District of Columbia v. Gallaher (124 U. S. 510).

School District v. Estes (13 Neb. 53).

THE CITY IS ESTOPPED FROM CLAIMING THAT, TO THE EXTENT OF THE ELECTRIC LIGHT COMPANY'S PRESENT OCCUPANCY OF THE STREETS, THE COMPANY IS OPERATING UNDER A FRANCHISE THAT TERMINATED IN 1905, OR UNDER A MERE LICENSE TERMINABLE AT THE WILL OF THE CITY.

Having permitted the Electric Light Companies to proceed uninterruptedly with the establishment and development of their plant for a period of twenty-four years under the assumption that they were possessed of an unlimited franchise without the slightest assertion or intimation on the part of the city that it questioned the duration of that franchise; having throughout that period, by numerous ordinances regulated the conduct of the business of the Electric Light Company in a way wholly inconsistent with the claim now made by the city; having required the company to place its cables in underground conduits at the expense of four hundred thousand dollars, at the very time when it is now urged that the franchise rights of the company were about to

expire, and would expire before the work of placing the conduits could possibly be completed; having entered into a contract with the company by which it was required to furnish electric light for the streets and public buildings of the city, and by which it was required to pay to the city a royalty on its gross income for a period of five years, which contract was in full force and effect and had several years yet to run at the time the concurrent resolution was passed, and at the time this action was instituted—the city under established elementary principles of equitable estoppel—is now precluded from claiming that, to the extent of its present occupancy, the company is not entitled to occupy the streets and alleys of the city for the transaction of its business.

This question has been decided by the Supreme Court of the State of Nebraska and the enforcement of this same concurrent resolution enjoined through the application by that Court of the doctrine of estoppel to only a portion of the same facts that are urged as a basis for the application of that doctrine in the present case.

In *Omaha Street Railway Company v. Omaha* (90 Neb. 6) the Supreme Court of Nebraska held that the City of Omaha is estopped from enforcing the provisions of the concurrent resolution No. 2330, insofar as the Street Railway Company's poles and wires are concerned, and to the extent of that company's present user, notwithstanding the fact that the Street Railway Company never claimed to be possessed of any franchise, license or right of any character or for any period of time by virtue of any ordinance or resolution, ever passed by the city, nor by virtue of any contract ever entered into with the city. Nevertheless merely by reason of the

acquiescence of the city in the prosecution by the Street Railway Company of a limited electric power business, and the expenditure by the Street Railway Company of certain sums in placing its electric power wires underground, the Supreme Court enjoined the enforcement of the provisions of the concurrent resolution sought to be enjoined in the present action, insofar as it affected the poles and wires of that company already in use.

The Court, after reciting the passage by the City Council of a certain ordinance regulating the transaction of the business of transmitting electric current, and of the ordinance requiring the placing underground of all electric wires and cables within a prescribed district and of ordinances requiring the issuance of licenses in connection with the furnishing of electric current, and, after reciting the fact that the Street Railway Company had, for a period of years, furnished electric current for heat and power purposes, says:

"We are not required to determine the question of incidental powers of the street railway company. It is sufficient to say that the company supposed it had the power under its charter to engage in the business of which the defendants now complain, and the city by its officers and agents assumed that it had such power, and by its acts not only permitted, but induced, the plaintiff to expend large sums of money, acquire valuable property, and enter into contract relations with the interveners and others to carry on that business. It follows that it would now be unjust and inequitable to permit the city to destroy the plaintiff's property and business which it thus fostered and encouraged, without compensation, and also deprive the interveners of their contractual rights therein.

A like question was before us in the case of *State v. Lincoln Street R. Co.* (80 Neb. 333), where it was said: 'The courts in a proper case will apply the

doctrine of latches to a case in which the state is party plaintiff. The state, like individuals, may be estopped by its acts or latches, and should not be allowed to oust a corporation of its rights and franchises where, for a long series of years, it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter.' This is a well recognized rule of equity." (Citing many authorities.)

In the light of this decision it cannot be possible that the Omaha Electric Light & Power Company, operating under a specific grant by ordinance, which for twenty-five years had been regarded by the city and by the company as conferring a perpetual franchise, on the faith of which several millions of dollars have been expended, should be held subject to the enforcement of the provisions of concurrent resolution No. 2330, and its business terminated and its property destroyed,—while the Omaha Street Railway, without possessing any franchise or license of any character or description by virtue of any ordinance or contract whatever and with an expenditure trifling in amount compared with that of the Electric Light Company, should be, by decree of the highest court of the State of Nebraska, adjudged entitled to an injunction prohibiting the enforcement of the provisions of that same concurrent resolution.

In *State, ex rel. v. Lincoln Street Railway Co.* (80 Neb. 333-346; 114 N. W. 422-427), the company, in order to acquire a right to enter and occupy the streets of the City of Lincoln, was required by law to obtain the consent of the city, expressed by a majority of the electors at an election. This it attempted to do. The necessary majority was obtained, the right was supposed to be com-

plete, and the company occupied certain streets and operated its cars many years before any question was raised against its right. The suit was instituted in the name of the state, by the County Attorney, to oust the company from *all* streets—those in which it had actually constructed its lines as well as all remaining streets of the city which it claimed the right to occupy by virtue of the election. It was held by the court that the proceedings by which the consent of the electors was obtained were so fatally defective that the consent was void and conferred no rights. But *as to the lines already constructed* the Court said:

“As to the constructed lines, it would be manifestly unjust, not only to the defendant, but to the holders of its securities, to now oust it of its rights and privileges which it and those through whom it takes title have been claiming and exercising for years, with knowledge and acquiescence on the part of the state. The state, like individuals, may be estopped by its act, conduct, silence and acquiescence. (Citations.) * * * In this condition of affairs it seems unconscionable to ask us to deny the defendant the right to operate its constructed lines, and as a consequence compel it to sell its property for what it may bring, or, if no sale can be effected, to make a scrap pile of its personal effects.”

And in a second opinion in the same case (p. 361):

“The manner in which the question of the consent of the electors of the city was submitted was clearly irregular, and the affirmative vote cast thereon just as clearly conferred no power upon the railway companies to use the streets of the city beyond the time when that right should be questioned by some proper authority. But we are not prepared to say that where the companies acted in good faith and expended their money in the construction of lines under a supposed right to occupy the streets, and

this right was not questioned until the bringing of the present action, they or those claiming under them should be ousted from the possession of such streets as are now occupied by their lines, and their property rendered worthless. Under the circumstances of this case, we do not think it would be a wholesome public policy to hold that, because of the irregularity which occurred in granting the right which the people had power to confer, such irregularity renders all proceedings under the vote void and of no effect."

In *People v. Union Gas & Electric Company* (254 Ill. 395; 98 N. E. 768) it appears that the city had required the Lighting Company to place its wires underground at an expense of \$50,000; had appointed a committee to investigate the quality of gas furnished by the company; had at various times required the company to repair certain street bridges and crossings; had accepted taxes on the property of the Lighting Company; had purchased gas light and heat from the company; had permitted the company to lay certain gas mains; had, by ordinance, recognized the Lighting Company as the assignee and successor of a former company appearing under a franchise, and had made no objection to the issuance of certain bonds by the Lighting Company. The Court says:

"The city had the legal right to grant it permission to do just what it has done, and is doing in the matter of manufacturing and distributing gas and electric current and to use the streets for that purpose. It appears from the averments of the pleas of estoppel that for ten years the city treated appellant as if it were in the lawful exercise of its franchise, and induced and permitted appellant to expend large sums of money in an endeavor to comply with requirements of the municipal authorities, a large part of which would be a total loss if appellant may now be ousted from continuing the exercise of its franchise because permission was not

granted ~~is~~ to do so by ordinance. This would be contrary to the well-settled law and to the principles of justice and fair dealing."

The Circuit Court of Appeals of the Eighth Circuit in upholding a contract entered into by the city council of Arkansas City by resolution for construction and maintenance of waterworks and in over-ruling many defenses interposed by the city in *Illinois Trust & Savings Bank v. City of Arkansas* (76 Fed. 271-293) in an opinion by Judge Sanborn, said:

"There is another and a conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract, which its records and its conduct have constantly made, and in reliance upon which the gas company and the water company constructed and extended the waterworks, and the bank and the bondholders loaned their money. No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. This principle is equitable because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong at the expense of the innocent purchaser or contractor who believed him. It is salutary because it represses falsehood and fraud. (Citing authorities.) This principle is as applicable to the transactions of corporations as to those of individuals. As Mr. Justice Campbell well said in *Zabriskie v. Railroad Co.*, 23 How. 381, 400, 401, in which the Supreme Court held that a corporation was estopped to question the validity of its void guaranty, because it had permitted the circulation of the bonds that carried it: 'A corpora-

tion, quite as much as an individual, is held to a careful adherence to truth in all their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.' (Citing authorities.) In a business transaction like that of procuring the construction of waterworks and the use of water for itself and its inhabitants, a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations."

For the many reasons heretofore urged there would seem to be no escape from the conclusion that the decision of the Circuit Court of Appeals is wrong and should be reversed. But for completeness of statement, we offer an additional reason, less basic than those heretofore urged, but none the less conclusive, against the legality and justice of the decision of which we complain.

The City of Omaha has not the right to arbitrarily determine for itself the merits of the existing controversy as to whether the franchise of the appellant company was perpetual or was for a term of twenty years or was a mere license revocable at the will of the city. The city has no greater right than an individual would have to proceed arbitrarily and with force to destroy the Electric Light Company's property and ruin the company's business, without any further warrant of law than the city's determination of the merits of the pending controversy, unsupported by any judicial sanction. The principle now contended for is well stated in the second paragraph of the Syllabus in *Nebraska Telephone Company v. City of Fremont*, supra (72 Neb. 25):

"FORFEITURE OF THE FRANCHISES AND EASEMENTS OF A PUBLIC SERVICE CORPORATION IN THE STREETS CAN BE DECLARED AND ENFORCED ONLY BY A COURT OF COMPETENT JURISDICTION. THE CITY CLAIMING A FORFEITURE CANNOT BE A JUDGE IN ITS OWN CAUSE, OR INVADE THE PRIVILEGES, OR DESTROY THE PROPERTY OF SUCH A CORPORATION, IN THE ABSENCE OF JUDICIAL WARRANT FOR SO DOING."

The reasoning of the Court in that case is so convincing that we quote at some length (page 30):

"Let it then be assumed, but without deciding—for in our opinion, the question is not now before the Court for decision—that the transfer from the association to the plaintiff was in violation of public law, that it was an abandonment by the former, followed by nonuser of such character that it incurred thereby liability to forfeiture of its grant. Has the plaintiff, by reason of the premises, become a trespasser upon the streets of the city and its property subject to spoliation by the city authorities or by the first comer? We have been cited to no judicial decision to that effect, and are quite confident that none can be found. By hypothesis, the city made a valid grant of a valuable estate in lands and put its grantee in possession. By some means—no matter what or how—the plaintiff, to use a common law expression, became seized of that estate. The city claims that the fact and manner of its grantee's disseizin has worked a forfeiture of the estate. Can the city sit in judgment on its own cause, and execute the judgment without more ado? We think not. A city, like an individual, can recover that which it has conveyed away, only by a voluntary reconveyance or surrender, or by the judgment of a court of competent jurisdiction. The declaration and enforcement of a forfeiture are judicial acts which can be performed neither by a municipal council nor by the legislature. This is so familiar a proposition

of law that little or no authority need be cited in its support, though the books are full of it. Thus says Beach on Private Corporations, vol. 1, sec. 45: 'It is conceded that a corporation may forfeit its charter or franchise for wilful misuser or nonuser thereof. For it is a tacit condition annexed to the creation of every corporation, that it shall be subject to dissolution by forfeiture of its franchise for wilful misuser or nonuser in regard to matters which go to the essence of the contract between it and the state; and a proceeding upon an information in the nature of *quo warranto*, filed by the attorney general on behalf of the state, is the proper mode of trying the issue. *The power of the courts in this respect is exclusive. The forfeiture of corporate charters is a penalty to be imposed by the judiciary alone.* Under no circumstances can the legislature presume to declare a forfeiture. Such an usurpation of judicial powers would be hostile to one of the fundamental principles of the American system, by which the legislative, executive and judicial departments of government are required to be forever separate, and would be a denial of due process of law. * * *

The Fremont telephone system is not an unlawful structure but a public work of great utility. The plaintiff, if in unlawful possession, to the detriment of the public, may be ousted by appropriate judicial proceedings, but private rights and public interests alike forbid wanton destruction of the property."

This principle was recognized by the Circuit Court of Appeals of the Sixth Circuit in *Iron Mountain Railway Company v. City of Memphis* (96 Fed. 113). The Railroad Company had been granted a right of way over certain streets of the City of Memphis, under an agreement which provided among other things that the former would, at no time, unequally discriminate against the city or its citizens in the matter of transportation rates. The city, claiming that the company had violated this provision, passed a resolution declaring that under the terms

of the agreement a forfeiture of the Railroad Company's rights had resulted, and that the city would proceed to resume its possession and control over the streets occupied by the Railroad Company. The question before the Court was one of jurisdiction. The Court, in a well reasoned opinion, in which many authorities are cited, holds that,

"Whether the action of the railroad company with reference to rights was a breach of the condition, and justified a forfeiture or not, an attempt by the city, through a resolution by its legislative council, declaring the forfeiture on that account, and the forcible taking possession, would together constitute the taking of property of the railroad company without due process of law." (p. 123.)

The Court quoted the very appropriate language used by Mr. Justice Miller, with reference to forcible entry and detainer statutes, in *Railroad Company v. Johnson* (119 U. S. 608):

"The general purpose of these statutes is that, not regarding the actual condition of the title to the property, where any person is in peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence or by terror. The party so using force and acquiring possession may have the superior title, or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself, in a case of that kind, by his own hand and by violence."

The Supreme Court of the State of Pennsylvania, in enjoining a municipality from attempting to interfere with the possession of a street railway company in the streets of the City of Easton, because of an alleged failure on the part of the Railway Company to fulfill its agreements as to the laying of track and the maintenance

of repairs, thus states the law in *Re Appeal of Easton, etc., Railway Company* (133 Pa. St. 505; 19 Atl. 486):

"The question here is, not what were the merits of this controversy—upon that subject we are not now called upon to express an opinion—but were the city officials justified in deciding this question, both as to its law and its facts, and then carrying their decree into effect by an act of brute force? * * * It is a serious mistake to suppose that municipal officers are above the law, and can enforce civil rights, or perform even police duties, in their own way in disregard of the forms of law. The officers of a municipality from the mayor down to a police officer, are as much bound by the law as a private citizen, and have no license to transgress the law in the enforcement of the law. * * * They have assumed to decide the delicate questions involved for themselves, and to enforce their decision by the strong hand. This cannot be permitted. We are of opinion that their acts were unlawful, and that the plaintiff is entitled to the relief prayed for."

In *Asheville Street Railway Company v. City of Asheville* (109 N. C. 688; 14 S. E. Rep. 316) the city had passed an ordinance declaring that because of an alleged failure of the Street Railway Company to perform certain conditions of its franchise, its right to use the streets of the city had terminated, and the Chief of Police was instructed to prevent the Railway Company from proceeding with the construction of its track. In enjoining the enforcement of that ordinance the Court says:

"The defendant, a municipal corporation, possessed of large and important powers, undertook, as is alleged, arbitrarily to declare its contract with the defendant at an end, and assert its assumed authority by force. This it could not lawfully do. If the defendant was constructing or proceeding to construct its branch railway without authority or in violation of its contract with the defendant, or in

such way as to seriously interfere with or imperil the rights of the public, the defendant had its appropriate remedy, civil or criminal, or both, through the courts. Its officers and agents misapprehended the nature and extent of its powers when it thus undertook to settle and determine its rights and those of the plaintiff, and assert its authority. There is nothing in its charter or in legal contemplation that warrants such exercise of power. It can pass ordinances, and make appropriate regulations and enforce them, establish a police force and employ the same for all lawful purposes, and do a multitude of important acts for the protection, convenience, comfort and safety of the people and their property, but it cannot at its will and pleasure, rid itself of contract obligations and engagements, whether the same concern individuals or other corporations. It is subject to the jurisdiction of the courts in appropriate cases, and it must seek its remedy, in like appropriate cases, through the courts. It can exercise authority only in the respects and in the way prescribed by law. The interference complained of did not simply affect the plaintiff; it affected in an important sense the public. The rights of the plaintiff were important, and concerned the public as well as itself."

II.

THE GRANT TO THE NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY OF A RIGHT OF WAY OVER THE STREETS OF THE CITY FOR THE TRANSACTION OF "A GENERAL ELECTRIC LIGHT BUSINESS" AUTHORIZED THE COMPANY TO DEVELOP AND TRANSMIT ELECTRIC CURRENT FOR THE PRODUCTION OF HEAT AND POWER.

The language of the ordinance is as follows:

"An ordinance granting the right of way to the New Omaha Thomson-Houston Electric Light Company and regulating the same, and prescribing penalties for the violation of this ordinance.

Be it ordained by the City Council of the City of Omaha.

Section 1. That the New Omaha Thomson-Houston Electric Light Company or assigns, is hereby granted the right of way for erection and maintenance of poles and wires, with all the appurtenances thereto, for the purpose of transacting a general electric light business, through, upon and over the streets, alleys and public grounds of the City of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance." (Record p. 2.)

In the opinion of Judge Munger of the Circuit Court, the meaning of the phrase "general electric light business" was not open to construction or explanation, but limited the grant to the furnishing of electric current for light, and excluded the furnishing of electric current for "heat or power."

The evidence establishes the facts that, under the

uniform practice of electric light companies, the term "general electric light business" includes, and always has included, the generation and transmission of electric current for heat and power, as well as for light; that this practical interpretation of the term has always prevailed since electric current was first used for the development of heat and power; that at the time of the enactment of the granting ordinance, the same reasons that actuated the city in entering into the ordinance contract for the purpose of securing the generation and transmission of electric current for light, for the advantage and use of the public, necessarily operated in the same way with reference to securing the generation and transmission of electric current for heat and power, though to a less degree by reason of the fact that, at the time, electric current was not so generally or extensively used for heat and power purposes as for lighting purposes; that from the establishment of the Electric Light Company's plant it has constantly furnished current for heat and power purposes, and that this use has continuously developed and extended, requiring the expenditure of over half a million dollars for that feature of the business alone; that a very large number of manufacturing and other business enterprises have equipped themselves for the use of the current to be furnished by the company for these purposes and have carried on such enterprises with the use of such current, all with the acquiescence and apparent sanction of the city; that the city has passed many ordinances regulating the character and use of the wires and cables for transmitting current to be used for heat and power, and with reference to the installation of equipment and use thereof by the company's patrons; has placed such matters under the jurisdiction of the city electrician; has re-

quired the issuance of innumerable licenses therefor; that the city has constantly collected from the company three per cent of the gross receipts from the sale of current to be used for heating and power purposes, and that a written contract to that effect had been in force for many years prior to the institution of this action and was then in force; that in 1902 the city by ordinance required the Electric Light Company to place in conduits all wires used for the transmission of electricity for "heat and power" as well as for light, and that in 1904 this agreement was re-embodied in an amendatory ordinance to the same effect; that the city itself, by ordinance, resolution and contract, has repeatedly construed the granting ordinance as including authority to transmit current for heat and power purposes; that up to the time of the passing of the concurrent resolution complained of, the city never, by word or deed, claimed or intimated that the company under the terms of the granting ordinance was not authorized to carry on the business of generating and transmitting electric current for heat and power purposes.

The Circuit Court of Nebraska, ignoring the testimony as to the meaning of the words "general electric light business" as interpreted by the universal practice of electric light companies; ignoring all the circumstances which induced the grant; ignoring the character of the contract, the purpose of the parties and the public advantages which it was sought to secure; *ignoring the construction placed upon the contract by the parties thereto for nearly a quarter of a century*; and ignoring the acts and conduct of the city constituting an estoppel—gave the clause in question the narrowest possible interpretation and held that the grant of authority to conduct a "general electric light business" did not authorize

the company to transmit electric current to be used for the development of heat and power. In so doing, the Court separated the words "general electric light business" from their context, and rested its interpretation upon the word "light" alone, construing it ostensibly as an arbitrary restriction of the consideration for the grant.

The Court refused to consider the meaning of the words "general electric light business" and the sense in which the parties employed the phrase, as shown by the undisputed facts, and determined the meaning as a question of which the Court would take *judicial knowledge*. A court cannot know what operations are embraced in the words "general electric light business." Effect must be given to the words "general" and "business," and what the phrase signifies can only be determined upon evidence of extrinsic facts. Clearly the phrase embraces and was intended to embrace whatever operations were usually and customarily conducted by such companies. But this is a fact to be established by evidence, which was established by undisputed evidence, which the court is bound to find according to evidence, but which the Circuit Court ignored.

The evidence shows that the term "general electric light business" included the furnishing of current for heat and power, according to the universal practice of light companies and those dealing with them.

Edward F. Shurig, an expert electrician, testified that:

"It has been the universal custom of all companies and persons engaged in generating and distributing electric current for the production of street and inside lighting, to supply consumers with such quantity of current as may be demanded and for such use as the consumer may see fit to make of it.

In supplying private customers, the universal method has always been to transmit current by means of wire conductors from the generator to the premises of the consumer, to be used by him for any purpose he may require, the current being sold to the consumer by measurement." (Record p. 29.)

Henry A. Holdredge, an electrical engineer of experience, testified:

"It has been the uniform custom of companies engaged in the generation of electric current for the production of light to also sell the electric current to consumers for the production of power or any other purpose for which it was desired.

I have never known or heard of any company or person engaged in the production and distribution of electric current for purposes of lighting which attempted to dictate the purpose for which any person should employ the electric current or to restrict its use by such person to the production of light." (Record p. 32.)

William F. White, formerly Vice President of the North American Company, and Vice President and General Manager of the Cincinnati Edison Company, testified:

"It has been the uniform custom of all companies and persons engaged in generating and distributing electric current for the production of light to supply consumers with such quantity of current and for such use as the consumer might see fit to make of it.

Electric currents adequate for the production of light may be utilized for the production of heat and power, as well as light, and it has been the universal practice of companies furnishing current to private corporations and persons for the production of light to also furnish such current for the production of heat and power, as rapidly as the devices for translating electric energy into heat or power have been made practicable and as the demand for such uses has developed." (Record p. 36).

Samuel E. Schweitzer testified:

"I have no knowledge of any electric light company and have never heard of one, engaged in serving private corporations and persons anywhere, which did not sell electric current for any purpose the consumer desired it for, and I believe it is, and that it always has been, a part of the business of every such company, from the time it was discovered that current could be practically applied for the production of power, heat or other purposes than light, and that it was so prior to the passage of Ordinance No. 826, by the Mayor and Council of the City of Omaha, in the year 1884." (Record p. 42.)

The foregoing testimony stands uncontradicted and unchallenged in the record. In the light of such testimony how can it be claimed that the term "general electric light business" did not *as a matter of fact* include the generation and transmission of electric current for heat and power purposes?

In investigating the question of fact as to what rights were intended to be granted by the ordinance in question, we must consider the purpose sought to be accomplished by the ordinance, the relation of the parties thereto, and the surrounding circumstances.

The city, when this franchise was granted, wanted to obtain for itself the lighting of its streets and public buildings by electricity, and for its inhabitants the benefits and advantages to be derived from the delivery of electric current to them in their homes and at their places of business. Electricity was a natural element the utility of which was not then and is not now fully understood; but then, as now, much was expected from discovery. The use of electric current for heat and power purposes was less general than its use for lighting purposes; since that time, its use for all purposes has developed beyond

all anticipation. But to whatever extent it was then used either for light or for power, its generation and transmission for use by the city and its inhabitants was greatly to be desired, and was the inducing cause for the enactment of the ordinance in question. It was not practicable for the inhabitants to provide the service for themselves, nor for the city to provide the service for itself or its inhabitants. The company wished to engage in the business of generating and transmitting electric current for lighting the streets, and for supplying the inhabitants of the city. The public welfare required that the service be obtained and the company was willing to furnish the capital, incur the risk of remunerative returns, and obligate itself to perform the service. But it was impossible to accomplish what either party desired without the grant of an easement in the streets, and the city, therefore, granted a "right of way"—"through, upon and over the streets, alleys and public grounds" of the city, "for erection and maintenance of poles and wires" with all of the appurtenances thereto. The things which the parties were contracting with reference to were the service to the public and the necessary easement in the streets. It is unreasonable to impute to the parties an intention to limit the benefit and advantages to the public, or the right and duty of the company to serve it, to the single use of the electric current for the production of light, by the mere recital, "for the purpose of transacting a general electric light business." It was manifestly the intention to secure to the inhabitants of the city the benefits and advantages of electricity for *all* uses for which it might be employed, and to the company the right to transmit it to consumers without regard to the use they may make of it. No rea-

son can be given for assuming that it was the intention to limit the operations of the company to a single use by the public, or to exclude any beneficial use. The primary and principal use of the electric current was in the production of light, and it was natural to speak of the business as a "general electric light business," although each party knew that the business was that of generating, transmitting and delivering electric current for the use of the public. It is of no consequence what the parties *called* the business. There was no occasion for being exact in designating it, and it is apparent that the words were employed to designate a service to the public which both parties knew would be performed, and could only be performed, by a sale and delivery of electric current to consumers for all practicable purposes, and that the particular use to be made of it was not a consideration which induced the parties to enter into the contract, excepting that, we are bound to assume, both parties contemplated the public would be effectively and fully supplied for all beneficial uses.

It is certain that a limitation of the use of the current to the single benefit of producing light, instead of being an inducement to enter into the contract, would have been an obvious reason to each party for rejecting it. In no possible view can it be supposed that either party would have entertained such a limitation. The fact that discoveries and inventions have been made by which the inhabitants of the city now use electric current extensively for the production of heat and power, though it increases the volume of business, does not change the business or operations of the company, any more than an increase of population or wealth does; and no argument can be made in support of the limitation, because

of an increased volume of business, with greater force in one case than in the other. It was certainly contemplated that the volume of business would be increased until the wants of the public were satisfied. That was the purpose of the grant.

The company makes no different use of the streets and exercises no different franchises in supplying current for heat and power than in furnishing current for light. It merely transmits and delivers electric current to all persons, by precisely the same instrumentalities so far as the public ways are concerned. That is what the parties contemplated it would do. That is what the city intended by this contract to obligate the company to do.

In making this grant the city was not exercising its governmental powers. It was not licensing a business injurious to the public, and which public policy required should be restricted or suppressed. It was exercising its proprietary or business powers and seeking to obtain advantages to itself for its inhabitants, through the performance by the grantee of a public service, which public policy required should be encouraged and developed to give the public the greatest benefits from the grant.

In *Illinois Trust and Savings Bank vs. Arkansas City* (22 C. C. A. 171-181; 76, Fed. 271-282), the Court said:

"A city has two classes of powers; the one legislative public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi-private, conferred upon it not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself, as a legal personality. In the exercise of the powers of the former class it is governed by the rules here invoked. In their exercise it is

ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way and in their exercise it is to be governed by the same rules that govern a private individual or corporation. (Cases cited). In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself, and its denizens." (Citation).
See also:

Pikes Peak Power Co. vs. City of Colorado Springs (44 C. C. A. 333-342.)

Omaha Water Co. vs. City of Omaha (77 C. C. A. 267-271; 147 Fed. 1.)

The city made the contract to induce the performance of the service by the grantee and the acceptance by the grantee created an obligation to perform the service. The rights and obligations of the parties are to be determined and the contract is to be interpreted upon the same principles and by the same rules as if it were made between private corporations or natural persons. To be sure there is the rule, applicable to legislative grants, that where there is real doubt as to the scope of the grant the doubt will be resolved in favor of the public, for the preservation of public rights. But it is a perversion of the rule to apply it where its application will defeat the public interest. No public right is invaded by the use which may be made of the electric current by consumers, as, for the production of heat or power. No public interest is subserved by prohibiting

or restricting such use. Any such restriction is plainly contrary to the public interest. The contention in behalf of the city and the conclusion adopted by the Circuit Court interpret the single word "light," not to prevent in the interest of the public, the acquisition by the company of a public right by means of doubtful and ambiguous words, which it may be fairly believed the public did not intend to grant; but to establish a *limitation* which was clearly against the public interest, which, when the grant was made, had no foundation in reason, and which will be found to be a simple repudiation of a contract which, for twenty-five years, has been fully and honestly performed by the company.

The purpose of the rule of strict construction of legislative grants can not be invoked to establish an intention which it is perfectly obvious the parties could not have entertained, or to suspend the elementary rules of construction by reading inapt words literally and regardless of the context, the nature of the contract and the plain purpose of the parties.

In *U. S. Fidelity, etc., Co. vs. Board of Commissioners* (76 C. C. A. 114-118; 145 Fed. 144), the Court said:

"The purpose of every written contract is to express the intention of the parties. The object of all construction of agreements is to ascertain that intention to the end that it may be enforced. The court should, as far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, its purpose, and the circumstances which conditioned its making, endeavor to ascertain what they intended to agree to do—upon what sense or meaning of the terms they used their minds actually met. (Cases cited). That intention must be deduced, not from specific provisions or fragmentary parts of the instrument, but

from the entire agreement, because the intent is not evidenced by any part or provision of it, nor by the instrument without any part or provision, but by every part and term so construed as to be consistent with every other part and with the entire contract. (Cases cited). The actual intent of the parties when thus ascertained must prevail over the dry words, inapt expressions and careless recitations in the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement."

In *Rockefeller vs. Merritt* (22 C. C. A. 608; 76 Fed. 909), the Court said (*italics are mine*):

"One of the most satisfactory tests to ascertain the true meaning of a contract is made by putting ourselves in the place of the contracting parties when it was made, and then considering in view of all the facts and circumstances surrounding them at the time of its execution, what the parties intended by the terms of their agreement. *When their intention is thus made clear it must prevail in the interpretation of the instrument regardless of inapt expressions or careless recitals.*" (Cases cited).

Obviously the purpose here was to grant, by the city, and to acquire, by the company, the right to erect and maintain poles, wires and appurtenances in the streets, for the purpose of transmitting and distributing electric current. There is no limitation as to time, as to particular streets, as to the number of poles and their location, as to the number of wires, or the appurtenances, or as to the volume of current which may be transmitted. The city wanted unlimited service. The public was protected against any abuse of the privilege and against deprivation of the use of the streets and alleys, by the express prohibition against interference with ordinary travel and the reservation of the right to *regulate* the exercise of the privilege and to compel the removal of the poles and the placing of wires under the surface,

and notwithstanding these regulations could have been enforced without express reservation, the express reservation shows that the city was alive to its future interest and the interest of the public, and that it was restricting the grant in clear and express terms, to the extent it thought there should be a limitation in the interest of the public.

The Circuit Court cited in support of its conclusion *Chicago General Street Railway Company vs. Ellicott*, (88 Fed. 941); *City of Toledo vs. Western Union Telegraph Co.* (46 C. C. A. 111; 107 Fed. 10), and *Abbott on Municipal Corporations* (Vol. 3, p. 907).

In the case of the Chicago Street Railway Company, it was merely held that a permit to string *two feed wires* along a route described by a street railway company "for the purpose of supplying electrical current to be used for operating, heating, and lighting purposes," did not authorize the company to distribute power to private consumers. Judge Grosscup said: "The permit granted on this application was to the Chicago Street Railway Company, a company operating only a street railway, and included simply the two wires asked for. I can not assume from this correspondence, that the city understood that these additional wires were to be used for the conveyance of electrical current to private consumers. The applicant was a street railway company, not a company generally furnishing electrical power. The privilege asked made no mention of anything other than the heat, light and power needed in the operation of street railways."

In *City of Toledo vs. Western Union Telegraph Company* it was merely held that the act of Congress of July 24, 1866, was limited to the business of telegraph

companies, as such, and did not authorize the Western Union Telegraph Company to install in the streets of the city "a district telegraph system." The Court said: "A district telegraph business, as disclosed by this record, consists in securing the attendance of messenger boys to carry telegraph messages, run miscellaneous errands, carry packages, distribute posters, invoices, invitations, etc. The business also includes night watchmen signals, fire and burglar alarms and police calls." And because this business did not come within the privileges granted by the Act of Congress it was held that the company could not install it *without the consent of the city*. The distinction between these cases and the case at bar is plain.

Mr. Abbott in the section cited in his text book, was discussing the proposition that the *contract* will determine the rights of the grantee—a proposition which it was hardly necessary to state. But it is true that it is said in the text that the rule of *strict* construction forbids a "company, authorized to supply electric light, from furnishing electric current for power though generated by the same plant and conveyed by the same wires or some of them." It is not certain that the mere opinion of this author, unsupported by either principle or authority, is entitled to any special consideration. The proposition is stated and citations are given as if it had been so decided by the courts; but it never has been, and the citations do not support the text, to any extent whatever. The text under consideration illustrates the vice rather prevalent in modern text books of solemnly stating important legal propositions and citing so-called authorities without either analyzing the proposition or the authorities. An examination of the cases cited by

the author shows that the proposition announced in the text is wholly without support.

The first case cited by the author in support of his text is *State vs. Murphy* (130 Mo. 10). The defendant as street commissioner of the City of St. Louis refused a permit to the Laclede Gas Light Company to construct sub-surface conduits for the reason that the company had refused to comply with certain ordinances regulating such work. The court expressly abstained from expressing an opinion on any question involving the right of the relator under its alleged franchise but confined its inquiry to "the question whether relator has a vested right to place its electric wires under the surface of the streets *without assent of the municipal authorities and without complying with the ordinances of the city.*" No other question was considered.

The next case cited is *Emerson vs. Commissioners* (108 Ohio St. 111). In this case it was merely held that "the General Corporation Act of 1874 providing *inter alia* for the incorporation of gas companies does not authorize the creation of a corporation for the purpose of supplying *natural* gas to consumers. The act contemplates only the supplying of a *manufactured product*, whether gas light or heat."

The next case cited is *Warren Gas Light Company vs. Pennsylvania Gas Company* (161 Pa. St. 510). In that case the plaintiff had supplied manufactured gas for many years, but not natural gas. Claiming an exclusive franchise the plaintiff sought an injunction to restrain the Pennsylvania Company from furnishing any gas for illuminating. The controversy was not between grantor and grantee, but between grantees, claiming

under separate grants, one claiming the right to exclude the other. Of course, in that case, the rule requiring strict construction is inflexible.

The last case cited by Mr. Abbott is *Scranton Electric Light & Heat Company's Appeal* (122 Pa. St. 154). The Scranton Gas & Water Company, in order to suppress competition, had acquired the stock of Scranton Electric Light & Heat Company and subsequently brought suit against the Scranton Illuminating Heat & Power Company to enjoin it from furnishing electric light to the people of the same district, claiming an *exclusive* right, under an act of the legislature, which gave an exclusive right to "companies incorporated under the provisions of this statute, for the supply of water to the public, or for the manufacture of gas, or the supply, of light or heat to the public by any other means." The controversy was between the grantees under separate franchises, and it was merely held by the Court (1) that the company had no standing in equity because of its attempt to suppress competition and "deprive the city and citizens of Scranton of a very useful, if not absolutely necessary commodity," by the acquisition of the stock of the Scranton Electric Light & Heat Company, and (2) that the grant could not be held to be exclusive as to electricity, because the language of the act limited the grant to lighting by process involving the use of gas through pipes laid in the streets.

I believe it may be safely said that, when this ordinance contract is interpreted according to elementary rules—in the light of the circumstances surrounding the parties and the object which each had and knew the other to have in entering into it—all ambiguity is cleared away and it is thus shown to have been the true intention of

the parties to enter into a contract investing the company with an easement in the streets for the erection and maintenance of its structures and appliances for supplying all persons with electric current, without any limitation whatever as to the character of the use to which it shall be put. If, however, the court should be of opinion that any ambiguity persists, then the acts and conduct of the parties in working together under the ordinance, have, according to the well recognized principle of interpretation above referred to, made the meaning certain.

THESE PARTIES HAVE, DURING A PERIOD OF NEARLY TWENTY-FIVE YEARS OF ACTUAL, PRACTICAL AND AMICABLE ENFORCEMENT AND PERFORMANCE OF THIS CONTRACT, INTERPRETED THE FRANCHISE GRANTED AS EMBRACING THE RIGHT AND IMPOSING THE DUTY TO TRANSMIT AND DELIVER ELECTRIC CURRENT FOR HEAT AND POWER AS WELL AS FOR LIGHT.

The facts are not in dispute. It is conceded that ever since the establishment of the plant, the companies have been permitted, without objection or protest on the part of the city, to furnish electric current for heat and power, and that this branch of the business has developed until at the time of the institution of this action more than \$500,000 had been expended in the development of the company's plant for the sole purpose of enabling it to supply the demand for current for those purposes. Something over 2,500 manufacturing and business enterprises have, at great aggregate expense, equipped themselves to receive and utilize electric current from this

company for those purposes and there is no other source from which such current could be secured. In the answer filed in this cause it is specifically "admitted that from time to time ordinances were passed regulating the production and distribution of electric currents of every kind, and that the complainant and its alleged predecessor has complied with such regulations; and defendants admit that the city passed ordinances prohibiting persons from using electric currents for power or heat or installing apparatus therefor without filing plans and specifications for the same in the office of the City Electrician and obtaining a permit; and ordinances requiring the City Electrician to inspect installations and repairs and requiring the same to conform to the regulations of the city; and ordinances requiring the City Electrician to make certain inspections each year with reference to electricity and electrical appliances and requiring the payment of certain fees for permits; and ordinances requiring persons engaged in commercial lighting and power transmission to furnish the City Electrician at stated times a report showing each minor installation put in or discontinued during the month, and ordinances requiring drop wires designed to carry power current to be heavily insulated; and ordinances prohibiting electric light and power wires being attached to the same cross arm and not to be suspended upon the same pole line with conductors of low potential currents like telephone and telegraph wires; and ordinances as alleged in the bill requiring various other regulations with reference to the generation, distribution and consumption of electric currents for light, heat and power; the defendants admit that the City of Omaha has issued permits for various installations to the complainant and

its alleged predecessor and has received the fees therefor from consumers and others." (R. 23-24).

It is admitted that in 1892 and again in 1894 and again in 1898 ordinances were passed regulating almost every imaginable phase of the business conducted by the electric light company in furnishing electric current for heat and power purposes (R. 59 to 95 inclusive) and that the provisions of these ordinances were enforced by the city and complied with by the company. It is shown that in 1902 an ordinance was passed requiring all electric and other wires when used for electric light, *heat and power* and other commercial purposes to be placed underground within a prescribed district (R. 96), and that in 1904 an amendatory ordinance was passed with reference to "electric wires or other wires in the City of Omaha and in the district hereinafter defined for the transmission of electricity for light, *heat and power*" (R. 98). Since 1900 contracts have been in force between the city and the appellant company by the terms of which "the company hereby agrees to pay, during the term, to the city a sum equal to three (3) per cent of the gross receipts from lighting *and power business* done within the City, not including any revenue derived from the said City, said payments to be made annually, on or before the 10th day of January in each year during the term, and any renewal or extension that may hereafter be made of the same." (R. 15).

The city evidently realized that both by acts of omission and of commission it had, during all of the years intervening between the establishment of the Electric Light Company and the passing of the concurrent resolution, construed the granting ordinance to include the authority on the part of the electric light companies

to generate and transmit electric current for heat and power purposes, for in the answer filed in this case the city pleads "and the defendants further allege that said concurrent resolution set forth in plaintiff's bill *was intended as and constitutes a revocation* of any permission that plaintiff or its predecessors at any time possessed to occupy the streets, alleys or public grounds of said City of Omaha with poles, wires or conduits for the transmission of electric currents for heat or power purposes." (R. 26).

The authorities in support of the contention we now make are set forth in preceding pages of this brief in support of the analogous contention that the city is bound by the construction claimed to have been placed by the parties upon the language in the granting ordinance to the effect that a perpetual franchise was thereby conferred.

The Circuit Court, not controverting either the fact or the rule, refused to apply the rule, on the ground that the contract is free from ambiguity or uncertainty, and by its express terms, limited the easement granted to the transmission of electric current to consumers who employ it in the production of *light only*. But as already pointed out, the court undertook to determine a fact, contrary to undisputed evidence, as a matter of judicial knowledge; because, when the court held that the words of the contract are free from ambiguity and uncertainty, and that they express a limitation of the franchise rights to the transmission of electric current to be used for the production of light, it determined the scope and meaning of and the sense in which the parties used the words "general electric light business." It was by excluding all of the facts, excepting the "dry words" of the con-

tract, that the court reached the conclusion that the contract was free from any uncertainty, and for that reason gave no effect to the interpretation which the parties had given it, voluntarily, while enforcing and performing it, during a continuous period of twenty-five years, in the interest of each and in the interest of the public, and on the faith of which the company had expended a large sum of money.

It is unnecessary to extend the argument in this direction. If, in the case at bar, we read the words of this contract in the light of the undisputed facts, the purposes which the parties sought to accomplish, and their continuous interpretation of the grant, the only conclusion possible is, that the city intended to obligate the grantee, and the grantee intended to assume the obligation, to serve the public generally, with electric current for all appropriate uses, and that the easement granted in the streets is as broad as is necessary to enable the grantee to perform this service, and the intention having been thus made clear, that intention must prevail in the interpretation of the instrument regardless of inapt expressions or careless recitals.

THE CITY HAS SECURED FOR ITSELF AND FOR ITS INHABITANTS THE ADVANTAGES AND BENEFITS OF THIS VOLUNTARY INTERPRETATION BY THE PARTIES, THE GRANTEE AND PLAINTIFF HAVE EXPENDED LARGE SUMS OF MONEY IN RELIANCE UPON IT, AND THE CITY IS ESTOPPED TO NOW SET UP A DIFFERENT INTERPRETATION.

The Circuit Court held to the contrary of this proposition. In doing so, we insist that the Court disregarded the uncontradicted evidence, and failed to apply

to the undisputed facts principles that are necessarily determinative of this case under the conceded facts as repeatedly established by the decisions of this Court and of the Supreme Court of the State of Nebraska.

In the case at bar there was a contract between the parties which was being continuously performed, which the parties had the power and duty from time to time to determine the scope and meaning of; they determined this, voluntarily, to the satisfaction of each, and to the advantage of the city and its inhabitants, the city receiving pecuniary advantage aggregating many thousands of dollars in the form of a percentage of gross receipts, and the continued lighting of its streets, the inhabitants receiving the benefits of continued service, while the company expended more than \$500,000 in construction in excess of what would have been expended, in order to enable it to perform and continue to perform the particular service. The interpretation was natural and reasonable, if not the only one possible. It was adopted by the parties in good faith, before any controversy had arisen. Equity and common honesty now forbid a repudiation of that interpretation by the city. In the words of ~~this court~~ *Justice* in a recent case in which the City of Omaha was the culprit: "A municipal corporation, in respect to its purely business relations as distinguished from those which are governmental, is held to the same standard of just dealing that the law prescribes for private individuals." That is as fundamental as "Thou shalt not steal."

It is unnecessary to here re-state the law and to again discuss the authorities supporting the principle for which we contend, as this proposition has been argued on preceding pages of this argument in support of the

contention there made that the city is estopped to now claim that the Electric Light Company is not possessed of a perpetual franchise. We will content ourselves with directing the court's attention especially to the case of *Omaha & Council Bluffs Street Railway Company vs. City of Omaha*, supra (90 Neb. 6), where this precise question, applied to only a portion of the facts construed especially in this case, is decided. As we have seen, the Omaha & Council Bluffs Street Railway Company neither had nor claimed any franchise or license by virtue of any ordinance, resolution, contract or other document. Its sole claim rested upon the facts that for a certain period of time (much shorter than the period during which the Electric Light Companies have been furnishing power) the company did, in fact, furnish electric current for power to certain customers; that this was done without protest on the part of the city, and that the company had expended a certain sum of money (very much less than the sum expended by Electric Light Companies for the same purpose), in equipping itself to perform that service. On these facts and on these contentions alone the Supreme Court of Nebraska held that, with reference to the Omaha & Council Bluffs Street Railway's poles and wires, the concurrent resolution complained of in this case could not be enforced on the ground that the city had estopped itself by its acquiescence and that "it would now be unjust and inequitable to permit the city to destroy the plaintiff's property and business which it has thus fostered and encouraged."

Under the authorities and in conformity with settled principles of the law applied to the undisputed facts in this case, it seems clear: First, Upon a correct interpretation of the ordinance contract it can not be held that

the rights granted—the enjoyment of the easement in the streets—are limited to the furnishing of electric current for any particular use; and that it must be held that the company has, by virtue of the grant, an indisputable right to distribute electric current for heat and power as well as for light, and second, the interpretation which the parties have, for twenty-five years, given to it as the result of their superior knowledge of its scope and meaning must be adopted by the court, and, Third, Upon the plainest principles of equity, by no Court more emphatically declared than by this, the city is estopped to now set up a different interpretation.

The law of the land will certainly be open to merited censure of those who contend that it is unreliable and fails to do justice if, on the one hand, it should be held by this court that the City of Omaha is authorized to and justified in carrying out the terms of the concurrent resolution referred to, thereby destroying the Electric Light Company's property, notwithstanding the conceded facts that the company has for a quarter of a century been furnishing electric current for power with the knowledge and acquiescence and without protest on the part of the city, and has expended more than \$500,000 in equipping itself for this service, all under an ordinance lawfully passed which, throughout that period, has been construed both by the city and by the company as granting the right to so furnish current for power, and which by its terms, does confer that power according to the universal interpretation placed upon the language by the companies engaged in conducting a "general electric light business," and where the city has collected large sums as a percentage on the gross amount of business so transacted

by the company in furnishing current for power, and, on the other hand, by decree of the Court of highest jurisdiction in Nebraska, the city is prohibited from enforcing the same concurrent resolution as against another public service corporation which neither had nor claimed any franchise right other than that growing out of the doctrine of estoppel applied to a set of facts concededly much less important and controlling and much weaker in their appeal to the conscience of the court.

We submit that the decision of the lower court is clearly wrong.

Respectfully submitted,

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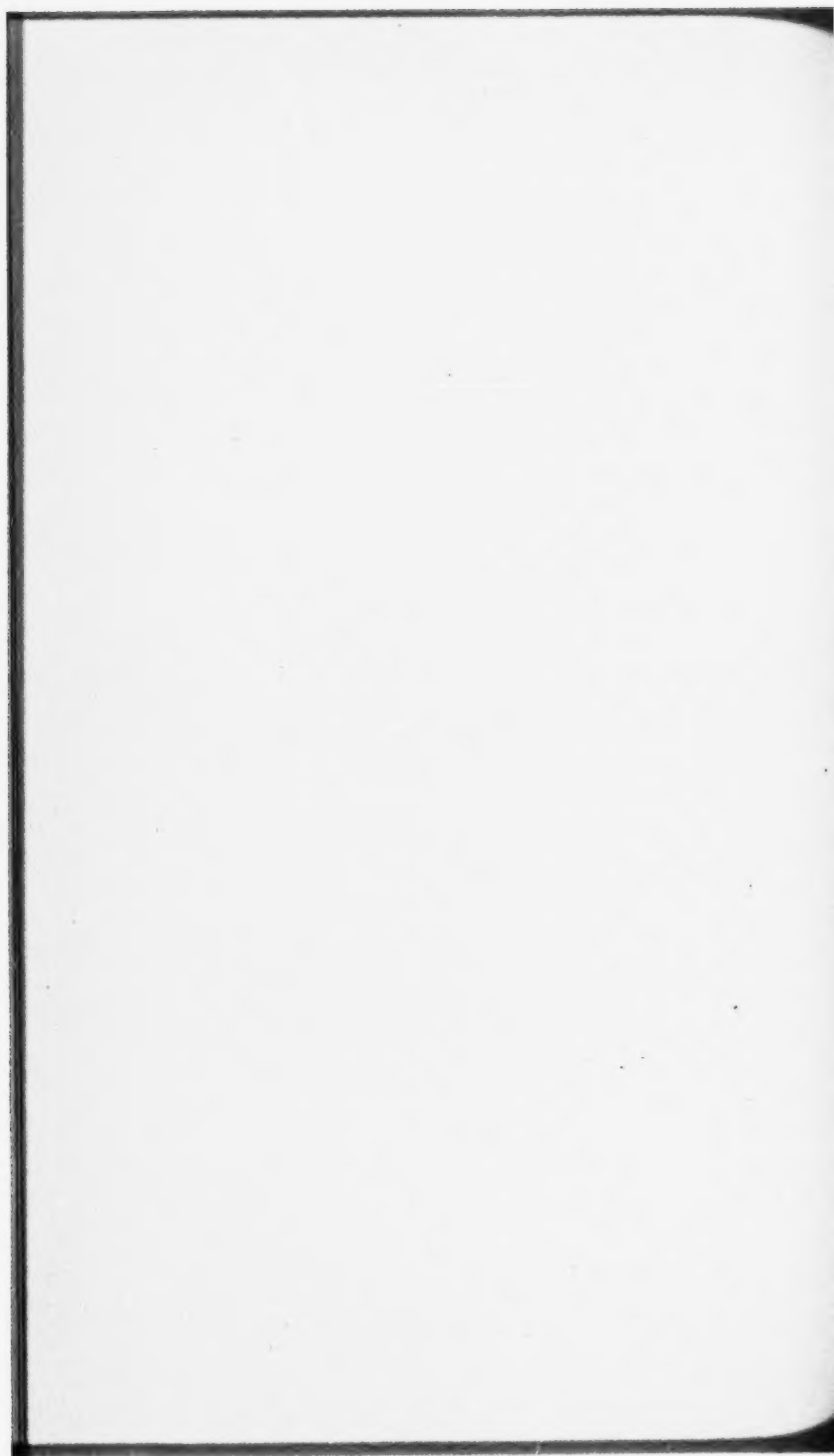
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In the Supreme Court of the United States.

OMAHA ELECTRIC LIGHT &
POWER COMPANY,

Appellant,

vs.

THE CITY OF OMAHA AND
WALDEMAR MICHAELSEN,

Appellees.

No. 162.

BRIEF ON BEHALF OF APPELLEES.

ARGUMENT.

I.

THE CITY OF OMAHA WAS WITHOUT AUTHORITY SO TO DO, AND DID NOT GRANT TO THE NEW OMAHA-THOMSON-HOUSTON ELECTRIC LIGHT COMPANY OR ASSIGNS A PERPETUAL RIGHT OF WAY OVER ITS STREETS.

(a) Appellant makes the claim that Ordinance 826 was a grant in perpetuity to the grantee named therein

and its assigns. And this claim appears to rest upon the absence or want of express limitations as to time in the grant, rather than express language to that effect. In the Circuit Court of Appeals, we contended and now contend that under the statute of this state at that time and the provisions of the constitution thereof, even though the mayor and council intended to grant perpetual franchise by Ordinance 826, they were powerless to do so. The Circuit Court of Appeals adopted this view of the controversy and accordingly so held.

We contended in that court and contend in this, that Section 16 of Article 1, Constitution of this state, prohibits even the legislature thereof from granting or authorizing the grant of an irrevocable perpetual franchise, special privilege, or immunity. This provision of the constitution forbids the passage of any law "making any irrevocable grant of special privileges or immunities." The inhibition is against an "irrevocable grant of special privileges" rather than against a grant of special privileges or immunities. A grant of a franchise, limited as to time and purpose, is a special privilege, but this is not censored by the constitutional provision cited. The grant of a perpetual franchise without reservation of power to revoke it is an irrevocable special privilege, prohibited by the constitutional provision above cited. None others can exercise these particular granted powers, even though others may be given like powers—they need but to be made irrevocable in order to violate the constitutional provisions of this state. It is conceded, even by the appellant that an irrevocable exclusive grant could not be given under the above constitutional provision, but it is contended by the appellant that the inhibition runs against an irrevocable exclusive grant only, rather than against an irrevocable perpetual non-exclusive grant. It seems to us that this

contention seeks a restriction upon the language used, "special privileges or immunities," at variance with both the spirit and the language of the provision. Had the provision of the constitution been intended to prohibit only the grant of "any irrevocable exclusive privileges or immunity," it would have said so in terms. Having used other and more generic expressions, apparently the inhibition was intended to cover other and different grants.

We assume that the purpose of the provision was to prevent recognized abuses attendant upon careless or corrupt legislative grants. Experience seems to have demonstrated that irrevocable exclusive grants and irrevocable perpetual grants have long been and now are the evil companions of legislation, alike to be prevented.

It would seem a waste of time to argue that a franchise or privilege in the nature of an easement or right to occupy the streets and public places of a municipality with wires, poles and apparatus for the purpose of serving the various parts of the municipality with electric current for lighting, is a special privilege or immunity as those terms are used in the provision of the constitution of Nebraska, *supra*. It is a right none others enjoy except those holding it. No others can exercise the identical powers granted during the life of the grant. It is a right not common to the citizens generally of the municipality. It is special because it relates to and confers upon particular persons particular powers and privileges.

In *Bank of Augusta vs. Earle*, 13 Peters 277, it is said:

"Franchises are special privileges conferred upon individuals, and which do not belong to the citizens of the country generally, of common right."

Birmingham St. Ry. Cases, 99 Ala. 469.
Port of Mobile vs. R. R. Co., 84 Ala. 115.
McQuillan Mun. Ord., Sec. 200.

Nature of Franchise Grants.

(b) Franchises are sovereign rights and the grant thereof is a grant of sovereignty to the grantee, to the extent of the grant. The sovereign, in this case, parted with so much sovereignty or the right of its exercise as is contained in the grant, either for a limited time or for all time. All sovereignty of this character is vested in the legislature of the state and may be exercised by it, subject to the constitution of the state, either directly or through municipal legislative bodies, boards or officers. Municipal bodies, boards or officers acting under delegated authority from the legislature, must act within the letter of the grant and can exercise no powers or authority not expressly delegated or which is not imperatively necessary to the exercise of authority expressly delegated. This does not necessarily mean explicitly delegated. Nothing passes to the municipal authorities by intendment. Doubt as to authority of this character destroys a grant. In order to grant a perpetual franchise, the municipal authorities must have been expressly given this authority by the legislature or it must be indispensably necessary in order to carry out authority expressly given.

Tested by these considerations, a perpetual grant was entirely unnecessary to the proper and full exercise of the powers given the municipal authorities by the legislature under either Subd. 24, Subd. 8 of Section 15, or other subdivisions of Ch. 10, Laws of Nebraska 1883; so likewise as to Subd. 8 of Sec. 1, Ch. 13, Laws of Nebraska

1885, set forth on page 12 of appellant's brief. None of these provisions in express terms or by fair implication gave the municipal authorities the right to grant to the appellant a perpetual franchise or easement. The full, fair and proper exercise of any and all of the powers conferred by said provisions of the statute did not require the grant of perpetual franchise for that purpose. All could have been completely exercised and their purposes and ends fully accomplished by limited life tenure grants of franchises or easements. No power necessary to the proper and full exercise of any of said statutory powers required a perpetual franchise to the appellant. The grantee in the ordinance did not desire or expect a perpetual franchise, did not ask it, and made no provisions to exercise a perpetual franchise.

Construction of Franchise Grants.

We can think of no answer to the contention of appellant herein, so terse, so comprehensive, and so explicit as that part of the opinion of the Circuit Court of Appeals handed down in this cause, by Judge Adams, and relating to the particular matter here under inquiry, and reported in 179 Fed. Rep. at p. 455, (pp. 117-123, record.)

On pages 120 and 121 of the transcript of record herein, the following appears:

"Legislative grants of power to municipal corporations must be strictly construed, and cannot operate as a surrender of legislative power except so far as expressly delegated or is indispensably necessary to the exercise of some other power which has been expressly delegated."

Citing many cases:

"Applying this rule to the present case we are of

the opinion that conference of power in general terms to 'provide for lighting of streets' or 'to care for and control the streets,' is not specific enough to warrant a grant by the city to a business corporation of the right to use the streets of the city forever for the purpose of conducting a general lighting business. That is a servitude embraced within the ordinary control over streets usually given to municipalities."

"A perpetual franchise, even if not exclusive in fact, becomes largely so by the advantage in the race which preoccupation of the field and perpetual right to continue it affords. And while it may not be technically obnoxious to the constitutional prohibition against 'granting special privileges or immunities,' it is so unusual and extraordinary as to require, in our opinion, a more specific legislative authorization than the general language relied on by the company therefor."

"We, therefore, conclude that even if the mayor and council had intended to grant a perpetual franchise to the company, they were powerless to do so."

In the light of the decision of the Circuit Court of Appeals, in this cause and the reasons given therefor, and in the light of the cases cited by that court and the reasons given in those decisions, it seems nearly the work of supererogation to cite further cases or to attempt to enlarge on the principles advanced and stated by the Circuit Court of Appeals.

But the appellant is militant upon this point. Like other public service concerns, it has had its own way so completely and been the ruler rather than the ruled so long as to make it difficult for it to understand that there might be just limitations imposed upon its exactions; consequently, we find ourselves somewhat in the position of Macbeth when goaded to exclaim, "Lay on, McDuff, and damn'd be him who first cries, 'Hold, Enough!'"

In *City of Ottawa vs. Carey*, 108 U. S. 110, Sup. Ct. Rep, 361-364, it is said:

"Municipal corporations are created to aid the state government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established."

In *Rhinehart vs. Redfield*, 93 App. Div. (N. Y.) 410, it is said:

"It is fundamental that a municipal corporation holds its public streets and places in trust for the public, and that the power to regulate those uses is vested in the legislature absolutely. It may delegate that power, as any other appropriate power, to the municipal corporation, but without such delegation any such act by the corporation, because of its not being within the strict or implied terms of its chartered powers, would be invalid. * * * Words and phrases which are ambiguous, or admit of different meanings, are to receive in such cases, that construction which is most favorable to the public."

"The power to regulate all matters connected with the public wharves and all business conducted thereon, and with all parks, places and streets of the city is not a power to grant a special privilege to individuals, involving not alone the right to put in pipes, conduits, etc., but the right to perpetually maintain them, and to have an exclusive interest in the streets for the purpose of carrying on a private business; is not a delegation of power to grant to individuals a right of property in the highways held in trust for the public."

In *Jackson County Horse R. Co. vs. Interstate Rapid Transit Ry. Co.* (C. C. A.) 24 Fed. Rep. 306, it is said:

"The precise question is, had the city of Kansas the power to grant for a term of years the exclusive right to occupy its streets with street railroads? That question must be answered in the negative. Let me in the outset formulate two or three unquestioned propositions: (1) The legislature has, as the general representative of the public, the power, subject to specific constitutional limitations, to grant special privileges; (2) It may, with same limitations, grant a like power to municipal corporations as to all matters of a purely municipal nature; but (3) as the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principle of social organizations and popular government, he who claims such exclusive privilege must show clear warrant of title, if not also probable corresponding benefit to the public. Hence the familiar rule that charters, grants of franchises, privileges, etc., are to be construed in favor of the government. Doubts as to what is granted are resolved in favor of the grantor, or as often epigrammatically said, 'a doubt destroys a grant.'"

In *Barnett vs. The City of Dennison*, 145 U. S. 135, 12 Sup. Ct. Rep., it is said at p. 819:

"It is the settled doctrine of this court that municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given or implied, because essential to carry into effect such as are expressly granted."

In *Logansport Railroad vs. City of Logansport*, 114 Fed. 688-689 it is, in part, said:

"Before the complainant, can in a court of equity, complain of the violation of the city of its contract rights, it must show that it has a contract, and that such contract is * * * * within the power of the city lawfully to enter into. * *

"It is manifest from a reading of the above mentioned statutory provisions that the legislature has not conferred, in explicit and express words, on the city of Logansport, the power to grant to a street railway company either an exclusive or a perpetual use of its streets for railway purposes. * * * * No words of perpetuity are expressly employed. * * * There being no express words of perpetuity in the legislative grant, is such power necessarily to be implied from the language employed?"

After reviewing another case, the court then says:

"And so it must be held here that similar and no broader language employed in the acts of 1861 and 1891, above mentioned, does not explicitly and directly confer the power on the common council of the City of Logansport to grant either an exclusive or a perpetual privilege to occupy its streets for railway purposes." * * *

"And how much stronger are the reasons which insistently forbid that the future should be committed and bound in perpetuity by the conditions of the present time, and that functions delegated for public purposes should be forever paralyzed in their exercise." * * *

"Easements in the public streets for a limited time are different, and have different consequences, from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently, those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them." * * *

"It was ultra vires of the common council to sur-

render its control of the streets of the city in perpetuity to the complainant. The municipal authorities had no power to grant forever to the complainant the right, at its own uncontrolled election, to use and occupy such or all of the streets of the city as it might from time to time elect." * * *

"Such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld. It cannot be supported as a reasonable exercise of the power of a trustee over a trust estate committed to its charge, to be administered in the interest of public, and not for the private advantage and gain of railway or other corporations."

In Boise City Artesian Hot and Cold Water Co. vs. Boise City, reported in 123 Fed. at p. 232, it is said:

"There can be no doubt that the grant of a privilege to lay water pipes and furnish the inhabitants of a municipality with water for a stated period of time, accepted and acted upon by the grantee thereof, is a grant of a franchise given in consideration of the performance of a public service and is protected against hostile legislation." * * *

"But had the Eastmans such a contract with the city as to come within the rule just cited? The ordinance of October, 1889, granted permission to the Eastmans and to their successors in interest to lay and repair their pipes in the streets of the city, and to furnish water to the inhabitants thereof. No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at the will of the grantor, or, by its acceptance on the part of the grantee it became an irrevocable and perpetual contract.

No middle ground is tenable between these two constructions. In the constitutions of nearly all the states it is provided that no exclusive or perpetual franchise shall be granted, and, irrespective of such constitutional limitation it is clear, both upon reason and authority, that no municipal corporation, in the absence of express legislative authority, has power to grant a perpetual franchise for the use of its streets. The City of Boise was incorporated by the territorial Legislature of Idaho on January 11, 1866. It was given power 'to provide the city with good and wholesome water,' and to erect or construct 'such waterworks and reservoirs within the established limits of the city as may be necessary or convenient therefor.' There can be no doubt that under this provision of its charter the city had the power to grant the use of its streets for a fixed reasonable period of time, either to an individual or to a corporation, for the purpose of furnishing water supply to the inhabitants. It had no authority, however, to make a perpetual contract. A municipal corporation intrusted with the power of control over its public streets cannot, by contract or otherwise, irrevocably surrender any part of such power without the explicit consent of the legislature. Cooley's *Constitutional Limitations* (2nd Ed.) 205-210; Dillon on *Municipal Corporations* pp. 715-716; *Barnett vs. Dennison* 145, U. S., 135-139, 12 Sup. Ct. 819, 36 L. Ed. 652. And legislative grants of power to municipal corporations are to be so strictly construed as to operate as a surrender of the sovereignty of the state no further than is expressly declared by the language thereof."

Citing many cases.

In *Water, Light and Gas Company vs. City of Hutchinson*, 207 U. S. 385; 28 Sup. Ct. R. 135, it is said:

"The kind of privilege is defined, not the extent of it. It is exclusive of some persons, but not of

all. It is exclusive of those who have not a grant from proper authority. There are privileges which may exist in their full entirety in more than one person, and the privilege or franchise or right to supply the inhabitants of a city with light or water is of this kind. A grant of power to confer such privilege is not necessarily a grant of power to make it exclusive. To hold otherwise would impune the cited cases and their reasoning. It would destroy the rule of strict construction. The foundation of that rule requires the grant of such power to be explicit—explicit in the letter of the grant—or, if inferred from other powers or purposes, to be not only convenient to them, but indispensable to them. And these conditions are imperative—too firm of authority to be disregarded upon the petition of equities, however strong.”

In People's Passenger R. Co. vs. Memphis City R. Co., 10 Wall. 38, it is said:

“Such corporations are usually invested with the power to lay out, open, alter, repair and amend streets within the corporate limits; but the rule is well settled that by virtue of those powers, without more, they cannot grant to an association of persons the right to construct, and maintain for a term of years, a railway in one of the streets of the municipality, for the transportation of passengers for private gain, and that a resolution or ordinance of the authorities granting such a right is void.”

“Special powers are given to such corporations to lay out, open and repair streets, as a trust to be held and exercised for the benefit of the public, from time to time as occasion may require; and the general rule is that those powers cannot be delegated to others, nor be effectually abridged, by any act of the municipal corporation without express authority of the legislature.”

In *Rhinehart vs. Redfield*, 93 App. Div. (N. Y.) 410, among other things, it is said:

"It is fundamental that a municipal corporation holds its public streets and places in trust for the public, and the power to regulate those uses is vested in the legislature absolutely. It may delegate that power, as any other appropriate power to the municipal corporation, but without such delegation any such act by the corporation, because of its not being within the strict or implied terms of its chartered powers would be invalid. * * * The relators recognize the necessity of showing legislative authority for the action of the common council, and our attention is called to subdivision 3 of section 12 of title 2, chapter 583 of the Laws of 1888. * * * Said subdivision of the section provides: 'That the common council shall have power within the said city to make, establish, publish and modify, amend or repeal ordinances, rules, regulations and by-laws, not inconsistent with this act, or with the constitution or laws of the United States, or of this state, for the following purposes.' * * * 3. To regulate all matters connected with public wharves and all business conducted thereon, and with all parks, places and streets of the city. * * * Is this a delegation of a power to grant franchises to private individuals? If the law maker was present, and he was asked if he had intended to comprehend this case when the statute was enacted, would he, as an honest and intelligent man, answer in the affirmative? * * * Would he declare that it was his intention, by this general language, to delegate to the municipal corporation the power to grant perpetual franchises, not for the general convenience and safety of the people, but as a foundation for a private business? * * * They attempt to invest these relators with a legal right to make use of the public streets for private gain to the same extent and with like effect as if possessing the franchise or privilege which

the Sovereign power alone could grant. . . .
 And empower them to make use of this property
 held in trust for the public." . . .

Cases Involving Construction of Grants on Analogous Questions.

(c) This same principle of strict construction has been invoked in a long line of cases in this and other courts with reference to the right of municipal authorities to fix, for determinate periods, rates and charges for public utility service, such as water rates, gas rates, telephone rates and electric light rates.

Freeport Water Co. vs. City of Freeport, 21 Sup. Ct. (U. S.) 493. In this case it is said:

"The power of a municipal corporation to grant exclusive franchises must be conferred in explicit terms. If inferred from other powers it is not enough that the power is convenient to other powers, it must be indispensable to them."

Danville Water Co. vs. Danville, 21 Sup. Ct. (U. S.) 505. *Rogers-Park Water Co. vs. John B. Fergus*, 21 Sup. Ct. (U. S.) 490.

In this last case the first paragraph of the syllabi is:

"A contract concerning governmental functions, such as one which affects the right of a city to regulate rates of a water company must be strictly construed, and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions."

Knoxville Water Co. vs. Mayor and Alderman of the City of Knoxville, 23 Sup. Ct. (U. S.) 531.

Home Telephone and Telegraph Company vs. City of Los Angeles, 29 Sup. Ct. (U. S.) 50. In this case it is said:

"Municipal authority to enter into a contract fixing unalterably, during the term of the franchise, charges for telephone service, and disabling it from exercising the charter power of regulation, must at the very least necessarily be implied from controlling statutes, even if it be conceded that anything less than a clear and affirmative legislative expression is a sufficient foundation upon which to rest an authority of this nature."

"Charter authority to regulate telephone service and to fix and determine the charges therefor does not empower a municipality to enter into a contract, fixing unalterably, during the term of the franchise, the charges for such service and disabling itself from exercising powers of regulation."

In *State ex rel Marshall vs. Wyandotte County Gas Co.*, 127 Pa. Rep. 639, wherein it is said:

"The power to contract for rates for furnishing water, light, heat or power to a city or its inhabitants is a sovereign, governmental power, which is vested in the law making power of the state. The power may be delegated to the mayor and council of a city, but is not to be inferred from mere convenience, but must be specifically granted or be absolutely essential to the exercise of the other powers expressly conferred on such mayor and council."

City of Woodland vs. Leech, 127 Pac. 1040. Decided Nov. 27, 1912.

What is not granted in explicit terms is withheld—*Coosaw Mining Co. vs. Tilman*, 12 Sup. Ct. 689.

Doubts in a grant must be resolved in favor of the public.—*Stein vs. Bienville Water Supply Co.*, 11 Sup. Ct. 892.

The Supreme Court of the State of Nebraska has never decided that statutory provisions substantially the same or identical with those under which the grant in ordinance 826 was made authorized municipal bodies to make an irrevocable grant for public service purposes, or that a grant, if not limited as to time in the grant, will be presumed to be perpetual.

Appellant has cited three cases decided by the Supreme Court of Nebraska, wherein it is claimed that the opposite to the above proposition has been decided. These cases are:

Sharp vs. City of South Omaha, 53 Nebr. 700.

Nebraska Telephone Co. vs. City of Fremont, 72 Nebr. 25.

City of Plattsmouth vs. Nebraska Telephone Co., 80 Nebr. 460.

Much is claimed for the decisions in these cases. Appellant has quoted and commented quite extensively on each of these cases. (pp. 12-25, brief).

The rule is well settled, and was well settled in this state at the time of the decisions in these cases, that the decision of the court is stated in the syllabus or syllabi to the opinion. That the opinion simply contains the statement of the reasons and illustrations of the judge writing the opinion, and the fact that the court concurs in the conclusion reached does not bind it to assent to the reasons given therefor.

In *Holliday vs. Brown*, 34 Neb. 232, is to be found the announcement of this rule in very explicit terms:

“There is an unwritten rule in this court that the members thereof are bound only by the points stated in the syllabus in each case. Each judge in the body of an opinion necessarily must be permitted to state his reasons in his own way

without binding the members of the court to assent to all such reasoning, although they may concur in the conclusions reached."

Tested by the rule which the Supreme Court of Nebraska has definitely established as a test for what has been decided in a case, it will be noted that neither of the cases above referred to, and cited by appellant, sustains the contention made by it or announces the rule which appellant claims is announced in these cases.

Nebraska Telephone Company vs. City of Fremont, supra, decided two questions and two only: (a) That consent required of the mayor and council is sufficiently proved by an entry in the records of a meeting of the council presided over by the mayor, reciting that a motion granting it was offered by a member and adopted. (b) That forfeiture of a franchise or easement of a public service corporation in the streets can be declared only by a court of competent jurisdiction, and that a city claiming a forfeiture cannot be a judge in its own case.

City of Plattsmouth vs. Nebraska Telephone Co., decided three questions: (a) A city ordinance granting to a telephone company the use of the streets, etc., which does not indicate an attempt to exclude other corporations from like privileges is not a grant of an exclusive right. (b) That a grant of the kind above stated is a grant of the use of the streets, etc., for a public purpose. And (c) when such grant has invited investments which are made in good faith, if the use be a public one, the city authorities cannot arbitrarily and by subsequent regulations, without public necessity or demand impose additional burdens upon the company, clearly beyond the reasonable exercise of the police power.

Sharp vs. City of South Omaha, supra, decided three questions: (a) That cities of the first class with less

than twenty-five thousand inhabitants, has authority to grant the right to a gas company to use the streets for the purpose of supplying its inhabitants with gas. (b) That authority to grant such a franchise is not restricted to persons or companies authorized to erect works within the city, nor need such franchises be limited to a period of five years. And (c) That certain sections of the charter of the city held not to be a limitation or restriction upon other subdivisions of the charter, but concurrent therewith and relating to a different subject.

None of the franchises involved in these different cases in terms granted a perpetual right to the use of the streets. On the contrary, the franchise in the case of *Sharp vs. the City of South Omaha* was expressly limited to twenty-five years. The nature of the controversy in each of these cases and the relief sought did not call for or require a construction of the grant therein as to the time of its duration. It is true that the judges writing the various opinions used the language quoted in appellant's brief, but it will be observed from the quotations set forth that the remarks in the opinion with reference to the authority conferred upon the municipal bodies to make a grant without limit as to time, or that the grant was one without limit of time were made in connection with questions, the decision of which did not call for a determination of whether or not there was authority to make a perpetual grant, or whether or not a perpetual grant had been made, but such statement by the judge in the opinion was merely illustrative of the reasons advanced for the particular views expressed on the phases under discussion. For instance, in the case of *Sharp vs. South Omaha*, and in that part of the opinion quoted near its close on page 14 of the brief, this remark appears :

Entirely distinct from the provisions on that subject there is ample grant of power, unqualified as to persons, method or time to regulate the laying down of mains, the sale and use of gas and the rate to be charged therefor."

The judge here does not say that there is "ample grant of power" to make a grant of perpetual franchise, but on the contrary, simply says there is "ample grant of power, unqualified as to persons, method or time, TO REGULATE, etc."

Like explanations apply with equal force to the various remarks found in the several opinions referred to. None of these cases decide or even assume to decide that the city authorities of the respective cities possessed the power to give a perpetual grant or that the respective grants were made in perpetuity.

Counsel for appellant is frank enough to admit as to two of these cases, at least, that the court did not have for decision such question directly before it or that the decisions in these two cases went directly to such questions, but contends that the conclusions arrived at in the opinion necessitated such views with reference to the grants in the particular cases. Moreover, it is contended by the appellant that such a construction of the powers of municipalities under statutory provisions very similar to those under which the grant in question was made, became a part of the contract as fully and to the same extent as if embodied therein. The contract in question antedated by years the decisions and the construction referred to and contended for. It is difficult to understand, therefore, how such construction could possibly enter into a contract made many years before the decisions, assuming that the decisions are all that is claimed for them.

In this connection it is of some interest and may be

of some importance to understand that the attorney who instituted the present action in the lower court and who presented it there as well as in the Circuit Court of Appeals, was also the attorney for the companies in the two cases cited, the Fremont case and the Plattsmouth case. It is impossible to believe that if he regarded the rule of construction and the rule of law so definitely and unquestionably decided and fixed by the Supreme Court of this state, that this case would have been started in the Federal Court rather than in the state courts.

In this connection counsel has argued extensively and quite learnedly on the benefits to be derived by all parties concerned from indeterminate grants of public service rights in the streets. Such question is a matter of policy committed solely to the administrative municipal bodies and not to the courts. The province of the court being to determine what the law is or was, as the case may be, and not what the court might think it ought to be.

It is likewise argued that the construction placed by the Supreme Court of Nebraska upon the power of the City of Omaha to grant a perpetual franchise, is supported by sound reason, and by the weight of authority elsewhere. The first part of our brief is designed to show, and we think abundantly shows that the weight of authority, overwhelmingly so, is to the effect that cities with no greater powers than that possessed by Omaha at the time of the grant, are without authority to make a perpetual grant; that the contrary view is not supported by sound reasoning; and that the Supreme Court of this state has never decided that cities therein with similar powers to those possessed by Omaha, at the time, have authority to make a perpetual grant.

The second assignment in the "Specification of Error" herein, follows:

"The Circuit Court of Appeals erred in deciding and holding that the ordinance—contract granting to New Omaha Thomson-Houston Electric Light Company, and its assigns, the franchise to occupy the streets and public ways, must be limited to the term of twenty years. (The term for which the grantee was incorporated under a general law of the state, after the passage of the granting ordinance). And that, 'Its assigns or successors might thereafter hold and enjoy the same at the will of the city only.' " (Trans. R. p. 138).

This assignment of error expressly states that the grantee in ordinance 826 incorporated only for the period of twenty years. This was after the grant in the ordinance had been made and before it had been accepted; showing, we think, that there must have existed a common understanding between the officers of the city and the promoters of the corporation that it would incorporate for such period. The existence of this corporation seemed to have ceased at the time named in its articles of incorporation, to wit, September 26, 1905, the existence of the corporation commencing September 26, 1885. (Trans. R. p. 103, Article 9 of the Articles of Incorporation.)

Before the expiration of the life of this corporation it seems to have undertaken to assign the ordinance in question and the rights thereunder to the appellant.

The contention that Ordinance 826 was not limited in duration to the corporate life of the grantee and was in no sense to be limited and controlled, as to duration, by the life of the grantee; is one bottomed upon the language and terms of the grant, or rather upon the fact that no time limitation, in terms, at least, appeared in the grant. It is therefore contended that the grant was a perpetual one and so intended by the officers of the

city. It will be observed that appellant is without other supporting circumstances for its contention. It may be true that the language and terms of the grant suggest some doubt as to the intended duration of life of the grant.

As against the suggestion of a perpetual grant innumerable reasons readily obtrude themselves:

First, the mere fact that there exists a doubt is all sufficient to justify its resolution in favor of the public.

Second, the mayor and city council had no authority to grant to the appellant a perpetual franchise to use the streets of the city for the purposes mentioned. This authority had not been given them.

Third, the granting ordinance did not exact or require of the grantee the performance of any duty thereunder, and it is not to be supposed that the mayor and council intended to give a perpetual right in and to all the streets of the city to carry on and conduct such business without reciprocal obligations whatsoever on the part of the grantee to continue the business either by itself or through succession.

Fourth, the grant expressly provided that whenever so declared necessary the grantee should remove from the public streets and alleys of the city all its poles and wires within the period of sixty days from the passage of the ordinance so declaring the necessity.

Fifth, the grant was made before there existed an incorporated company under the name of the grantee and presumably made pursuant to an understanding with persons that a company would be incorporated in that name and for the purpose of accepting the grant. That within a year after the grant a company was organized and became incorporated under the name of the grantee and in incorporating expressly limited its life tenure to twenty years and made no pro-

vision whatsoever for continued existence or succession to carry on and forward the obligations of the grant; presumably pursuant to an understanding and arrangement between the city officers and the promoters of the grantee company that the life of the grant was for a term not greater, at the most, than the provided life of the accepting company, otherwise no satisfactory or persuasive reasons suggest themselves why the life tenure of the grantee should be shorter than the understood life of the grantee and its obligations.

And sixth, had the intentions been to grant a perpetual franchise and had the parties, both grantors and grantees, intended such, the ease with which this purpose might be aptly and appropriately expressed by language, and all doubts as to the duration of the grant entirely eliminated, argues convincingly that a perpetual grant was not intended.

A grant of a franchise to a corporation with limited life tenure, will be presumed to be for the life of the corporation, unless otherwise provided. The grant in question was understood by the parties to it to be for the life of the grantee named therein.

If this be a correct view, as suggested by the equities involved, then all reasons and all legal principles involved insistently suggest that the grant was never understood or intended by any of the parties to it to be for a longer period of time than the life tenure of the grantee. Beyond that period of time, in any and at all events, the grantee could not be required to continue the service or to make any arrangements for its continuation. The grantee having incorporated and having fixed its life tenure after the grant had been made, every presumption

of law and of reason conclusively, it would seem, suggest that the life tenure of the grantee corporation was fixed with reference to a certain definite, common understanding between the parties to the grant, for a period which would enable it fully to carry out the grant. Otherwise the grantee is to be in the uncomfortable attitude of appearing to practice upon the grantors a legal fraud, to say the least, and of gambling with the interests and rights of the public by putting itself in a position to play safe and to escape obligations if after an experimental period of comparatively short duration the service became burdensome rather than beneficial to it. On this assumption there seems no other explanation for its conduct and acts. This the court will not tolerate. Dishonesty is such and nothing less whatever the guise or form it may take.

The Federal Court of Appeals adopted these views of the city and in a vigorous, terse statement gave its reasons for so holding. It is doubtful if any attempted enlargement of the reasons for such views would add much which would be helpful.

On page 459 of the 179th Federal Reporter, and in this case, *Omaha Electric Light & Power Company vs. the City of Omaha*, appears the following:

“The ordinance when taken as a whole and construed in the light of what was expressed, as well as unexpressed, in it, and in view of all the attending facts and circumstances, discloses, we think, a clear purpose not to grant a perpetual franchise. The right to use the streets of the city forever to inaugurate and promote a private enterprise would seem to have been so important and valuable a feature of the contract as to irresistibly lead the contracting parties to mention it specifically if they intended to provide for it and not leave its existence dependent upon implication.”

"The ordinance actually reserved to the city the right to require the removal of the poles and wires from the streets within sixty days after the city council should declare the necessity therefor by ordinance. This is not only inconsistent with, but it seems quite repugnant to the claim of perpetuity now made by the company. On the other hand, the cost and expense of installing and maintaining an electric light system was so great as to render it unlikely that the company would embark upon it without assurance of some reasonable term of enjoyment. Moreover, the fact that the company was permitted without let or hindrance to continue its business for the full period of twenty years indicates a mutual understanding that some substantial term of enjoyment was contemplated. * * * In view of the foregoing, disclosing that no perpetual franchise was intended and pointing to the improbability of the company embarking upon the business without some assurance of extended enjoyment, we think the fact that the corporate life of the company continued for a period of twenty years affords a key to the true intention of the parties. It is improbable that the mayor and city council with due regard to the rights of the inhabitants of the city would tie their own hands as well as that of all future councils and mayors by granting a perpetual franchise to a company whose corporate life rendered it certain that it could not discharge its duties more than twenty years, and with no obligation upon it at the end of its life to assign its rights to another person or corporation not empowered or obligated to accept the grant and perform the desired service."

"In *Turnpike Company vs. Illinois*, 96 U. S. 63, the Supreme Court of the United States in considering whether the grant of a given franchise was in perpetuity or not, made use of the following language: 'No term was expressed for the enjoyment of this privilege; and no conditions were imposed for resuming or revoking it on the part of the state. It cannot be presumed that it

was intended to be a perpetual grant; for the company itself had but a limited period of existence. At common law, a grant to a natural person, without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. By analogy to this, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation. * * * Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public.' "

"In *Wyandotte Electric Light Company vs. City of Wyandotte*, 126 Mich. 43, 82 N. W. 821, the Supreme Court of Michigan considered an application to restrain interference with poles and wires of an electric light company, and said: 'If a railroad company were organized for a period of thirty years, and a party, natural or corporate should grant it a right of way without specifying the time of user the grant would be for the lifetime of the corporation. The law would imply that both parties contracted with reference to its period of existence.' The same rule is applicable here. Citing *Turnpike Company vs. Illinois*, supra,"

"To the same effect are *Blair vs. Chicago*, 201 U. S. 400, 481, 26 Sup. Ct. 427, 50 L. Ed. 801; *City of Rock Island vs. Central U. Tel. Co.*, 132 Ill., App. 248; *Virginia Canon Toll Road Co. vs. People*, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711."

"We think the facts of this case, in the light of the foregoing authorities, disclose the intention that the company should have and enjoy the franchise in question at least for the period of its corporate existence, and that its assigns, or successors might thereafter hold and enjoy the same at the will of the city only."

"This conclusion reconciles many, if not all, of the apparent inconsistencies of the situation, and is not in disharmony with the principle declared in *Detroit vs. Detroit Citizens' St. Ry. Co.*, 184 U.

S. 368, 395, 20 Sup. Ct. 410, 46 L. Ed. 592, and *State ex rel City of St. Louis vs. Laclede Gas-light Co.*, 102 Mo. 472, 14 S. W. 947, 15 S. W. 383, 22 Am. St. Rep. 789, that a corporation whose corporate existence was limited to a term of years could accept a grant or make a contract extending beyond the limit of its corporate life. The question here is not whether a lawful contract could be made for a term extending beyond the corporate life of the company, but relates to the probative force which limited life tenure among other facts and circumstances has in construing a contract of uncertain and ambiguous character, like that under consideration."

"It follows that the electric light and power company at the time of the threatened removal of its equipment by the city was occupying the streets as a licensee at the will of the city."

Of the cases cited by the Federal Court of Appeals in the foregoing case and not quoted from or commented upon is that of *Virginia Canon Toll Road Company vs. People*, 22 Colo. 429, 45 Pac. Rep. 398, 27 L. R. A. 711; and therein it is, among other things, said:

"It is no answer to this proposition to say that the corporation is deprived of that which is valuable, for the corporation is deprived only of that which, by implication, it agreed to relinquish upon the termination of its corporate existence. If the rule were otherwise, the result would be that a toll-road company, which under our statute is limited to twenty years, might indefinitely prolong its existence and perpetuate its franchise. * * * For, just before the termination of its corporate existence its stockholders could (as was attempted to be done here) form a new corporation, to which the property and franchise of the old one would be transferred, and the business continued, and when the second corporation was about to expire, a third one could

in like manner be formed, and so on for all time."

In *Rock Island vs. Central Union Tel. Co.*, 132 Ill. App. 248, it is, in part, said:

"The ordinance of 1887 did not limit the period during which appellee could maintain its poles and wires upon the street. That did not make the ordinance a grant in perpetuity. * * * A grant to a corporation aggregate, unlimited as to the duration of its existence, without words of perpetuity being annexed to the grant only creates an estate for the life of the corporation."

In *Blair vs. Chicago*, 201 U. S. 400-505, it is, in, part said, at page 481:

"In the west side system the ordinance of August 17, 1864, is silent as to the term of the grant. We do not think this indicates any intention on the part of the city, even if it had the power under legislative acts then in existence, to confer the right in perpetuity to the occupancy of the streets. * * * We think in such case that the terms granted would not extend beyond the life of the corporation conferring them where there was no attempt to confer a definite term, assuming, without deciding, that it was within the authority of the municipality to make a grant in perpetuity."

See also, to the same effect:

People ex rel vs. Central Union Tel. Co., 232 Ill. 260, 279.

People vs. Chicago Tel. Co., 220 Ill. 238.

Snell vs. Chicago, 133 Ill. 413.

Venner vs. Chicago City Railway Co., 236 Ill. 349.

Telephone Co. vs. Telephone Co., 118 Ky. 277.

Louisville Trust Co. vs. Cincinnati, 76 Fed. 296.

In opposition to these views it may be that the cases of *Detroit vs. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368-395, 20 Sup. Ct. 410, 46 L. Ed. 592; *State ex rel City of St. Louis vs. Laclede Gaslight Company*, 102 Mo. 472, 14 S. W. 947, 15 S. W. 383, 22 A. M. St. Rep. 789; and *Louisville vs. Cumberland Telephone and Telegraph Co.*, 32 Sup. Ct. p. 572, will be cited and urged.

Of the two former cases cited we think the statement with reference to these cases in the opinion of the Circuit Court of Appeals, should be all sufficient to show that the same has no application here, wherein it is said:

"That a corporation whose corporate existence was limited to a term of years could accept a grant or make a contract extending beyond the limit of its corporate life. The question here is not whether a lawful contract could be made for a term extending beyond the corporate life of the company, but relates to the probative force which limited life tenure, among other facts and circumstances, has in considering a contract of uncertain and ambiguous character like that under consideration." Such was the question in the first two cases last above cited.

Concerning the case of *Louisville vs. the Cumberland Telephone and Telegraph Company*, supra. The question at issue was unlike the question involved in this action. The legislature had given the corporation a *perpetual franchise to be* and had authorized it to erect its poles, string its wires and operate its system in the streets of Louisville upon obtaining from the city the consent so to do. The city gave its consent in the proper manner without conditions or limitations. There was no provision of the statute or within the terms of the consent that would permit a withdrawal thereof. Pursuant to its franchised rights from the state and the consent obtained

from the city the company constructed, continued and operated an extensive plant in the city. Sometime thereafter the city undertook to recall the consent previously given, or to repeal the ordinance giving the consent. It will be observed in this case that the charter granted to the company by the state of Kentucky authorized it *for all time* to construct, operate and maintain its plant in Louisville and empowered it to mortgage and pledge the same and exacted of it the performance of the services undertaken. Therefore, it is apparent that without the right to use the streets,, and this could be had under the terms of the grant only from the city, the rights granted by the state and the property devoted to the plant and all interest connected therewith would become valueless. It was, accordingly, held that *perpetual right to be a corporation* and to *operate* a telephone system in, through, and over the public streets of the City of Louisville after the proper consent had been obtained and the obligations so to do, became perpetual, that the municipality could not, by ordinance, destroy or render ineffective this grant, inasmuch as the denial of the use of the streets for such purposes would be in effect a *destruction* of the *franchise to be* from the state and of the property. In other words, this construction of the grant was necessary for the full exercise of other powers expressly granted.

It is clair on principle that the questions there involved are not the same as the questions here involved; and any claim of that character is entirely set at rest by statements of the court in that opinion. Some of the cases cited in this brief and also cited in the opinion of the Circuit Court of Appeals were there cited and urged upon the court, and concerning which the court expressly says that none of such decisions are applicable

to a case like the one there under consideration. Following is a part of the opinion in that case:

"5. The appellant makes the further contention that its general demurrer should have been sustained and the bill dismissed because the original grant of street rights, having been indefinite as to time, was either void ab initio, or revocable at the will of the general council." * * *

"In support of this proposition numerous decisions are cited. In some of which it appeared that the state had chartered a public utility corporation, but the city, by ordinance, had given an exclusive or perpetual grant of a street franchise which was held to be void, because made in excess of the statutory power possessed by the municipality. In others, the company had been incorporated for thirty years, and the street right was held to have been granted only for that limited period. In others, it was decided that such privileges terminated with the corporate existence of the municipality through whose streets the tracks and rails were laid." * * *

St. Clair Co. Turnpike Co. vs. Illinois, 96 U. S. 63, 24 L. Ed. 651; *Blair vs. Chicago*, 201 U. S. 400, 50 L. Ed. 801, 26 Sup. Ct. Rep. 427; 3 Dill Mun. Corp. sections 165-169."

"None of these cases are applicable to a case like the present. * * * This grant was not at will, nor for years, nor for the life of the city. Nor was it made terminable upon the happening of a future event, but it was necessary and an integral part of the other franchises conferred upon the company, all of which were perpetual, and none of which could be exercised without this essential right to use the streets."

Enough has been said and quoted of and from this case clearly to show that there exists no parallelism be-

tween the facts in that case and the facts of the case at bar, and clearly to show that the rule in that case either upon principle or in law should not be the rule in the case at bar.

See also:

Louisville Trust Co. vs. Cincinnati, 76 Fed. 296.

Lake Roland Elev. R. Co. vs. Baltimore, 77 Md. 352.

The case of *People vs. O'Brien*, 111 N. Y. 1, is cited in this connection by appellant and is advanced as a leading case under this head. One or two observation on that case should be sufficient to show that its facts are unlike the facts in the case at bar. In that case, the franchise or privilege was sold at auction and bought by the company as it would buy any other property. The law of that state then permitted such disposition of municipal franchises. The company became the owner of the franchise and such interests as it gave, the same as it would become the owner of any real estate and could retain it or part with it the same as it could with any other property. We are not making the contention here that a company with limited life tenure could not become the owner of property and hold it as a part of the assets of the corporation to be disposed of for the benefit of the stockholders or creditors. The legislation in the New York case sought to take this property so purchased away from the company. That is not the case here. The contention made here is simply that it is unreasonable to suppose that the municipal authorities would be willing to give or would give a franchise in perpetuity to a company having a life not to exceed twenty years, and no requirements on its part to continue the service or to make any arrangements for its continuation.

The reservation in the grant in question is inconsistent with and repugnant to the claim of perpetuity.

This is so stated in the opinion of the Circuit Court of Appeals in the case of *Omaha Electric Light & Power Company vs. the City of Omaha*, heretofore cited, wherein it is said:

“The ordinance actually reserved to the city the right to require the removal of the poles and wires from the streets within sixty days after the city council should declare the necessity therefor by ordinance. This is not only inconsistent, but it seems quite repugnant to the

claim of perpetuity now made by the company.”

The facts with reference to the foregoing reservation in the grant, though the record probably does not present that aspect of its history, are that the ordinance was first introduced and had been read on one or two occasions without containing this reservation. That during some period of its history of passage before the municipal body, this ordinance was recommitted to a committee and amended by inserting this reservation therein and thereafter reported back and passed as thus amended. We have said before herein and say again that a proper construction of this reservation within the grant reduced the grant to a legislative permit with a definite reservation that the same might be revoked at any time by the city, whereupon the grantee would be required to remove its wires and fixtures from the streets and public places thereof.

In the apparent light of the purposes of such reservation in the ordinance and in the light of the history of its insertion therein, it is but fair to contend, in fact, it

may be asserted with definite assurance that the grant would not have been made except that it contain such reservation. Anyhow, the reservation was in there when the grant was made. It was definite notice to the grantee of the terms on which the city was willing to make the grant. No obligation rested upon the grantee to accept it, and having accepted it with such reservation therein, it will not be heard to make any complaint if the grantor seeks the exercise of the reservation. All that the grantee and its successors and assigns have done in the way of installing, operating and maintaining its plant and equipment have been done with full knowledge of the rights of the grantor within the terms of and according to the provisions of the reservation, to enforce the same and to require the removal of all parts of the plant from the streets, alleys and public places of the city.

It may be well assumed that had not the grant contained the reservations above mentioned, a definite time limitation would have been named and other definite restrictions and limitations inserted. It is, therefore, manifestly unfair and would be unthinkable unjust to the city, at this time to deny it the full authority to enforce the reservation, because it would be in effect denying to it an opportunity to insert in the grant restrictions and limitations and rights upon the part of the grantor which it may have thought fully protected by the reservation. Such a course would likewise be allowing to the grantee a grant of unlimited authority not intended to be made.

We are not unmindful of the rule of construction with reference to grants which have prevailed in the courts since the decision in the celebrated Dartmouth College case to the effect that grants, though legislative in form, become contracts when accepted and acted upon by the grantee, entitled to protection by the laws protecting contracts, and in the absence of limitations, restrictions

or reservations, either in the fundamental law, independent legislation or reservation in the grant, are irrevocable, assuming the existence of authority to make the contract. On the contrary, if the right is reserved to repeal the grant, modify it or control its exercise in either the fundamental law, independent legislation or within the grant, then the rights of the grantee thereunder pass subject to such restrictions and reservations or limitations and the grant is held subject to the same and its right of exercise dependent thereupon.

So that the grant in the case at bar amounts to no more than legislative permission and it is reserved to the body making the grant or any subsequent legislative body to exercise the reservation in the grant and to require the grantee to remove from the public streets and alleys of the city such apparatus as may be installed and operated therein for the purpose of carrying out the work to be done under the grant. In other words, the municipality has by reason of the reservation retained the authority to terminate the grant at any time and in conformity with a right to that end definitely reserved within the grant at the time of its acceptance by the company.

In *Detroit vs. Detroit City Ry. Co.* 56 Fed. 867-876 (C. C. A.), in passing upon that portion of the question involved in the opinion with reference to the right of the city council under a general power over the use of the streets, to grant a permit or a license to a street railway company, Judge Taft said:

“But this would only be in the exercise by the council of legislative power. The same council, or a succeeding one might, in its discretion, revoke the license. It must be so, because it is well established that in such subordinate legislative bodies it is not permitted to one to abridge the legislative power of its successors without ex-

press sanction of law. The first council permits a railway in a street because it is of the opinion that such a use will best conduce to the public interests. When another council succeeds, it may conclude that the conditions have changed. * * * Under the exercise of its legislative power, to regulate the use of the streets, unless limited or abridged, the second council could require the removal of the tracks."

If such are the powers enjoyed by municipal bodies as to legislative grants, unless restricted in cases where plain authority for such restriction has been delegated; then how much more fully must be the city's rights in these respects, where, as in the case at bar, the right was expressly reserved within the grant to terminate it when the city council saw fit so to do. This right so reserved is one entitled to strict construction in favor of the public.

The case of *Southern Bell Telephone and Telegraph Company vs. City of Richmond*, 44 C. C. A. 147, aptly illustrates the questions involved in the phase of the controversy under discussion. Section 5 of the grant there under consideration follows:

"Section 5. This ordinance may at any time be repealed by the council of the City of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law."

In discussing the conditions of the grant at page 154, it is said:

"These conditions were accepted by the telephone company in the most direct and satisfactory way. The company acted upon them, and under the ordinance constructed, maintained, and operated its line. No question is made as to the first four conditions. The fifth is in these words:

'This ordinance may at any time be repealed by the council of the City of Richmond.' Then are added words which are clearly a concession to the company: 'Such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law.' Under the act of the general assembly, the council could consent or refuse. It states to the company the terms on which it will give its consent. These terms were accepted by the company, and the ordinance discloses the contract between them. If the terms were distasteful to the company, it could have refused them, or, at the least, protested against them. It is contended that under the act of the legislature the city council could give only a categorical answer to the request for its consent, 'Yes' or 'No,' without terms or conditions. But as the act itself expressed no regulations to be observed by a telegraph or telephone company in its use of the streets or alleys of a municipality, although it had done this as to the use of county and state roads, etc., clearly in referring such a company to a municipal council, it was intended that the council could state the proper measures for protecting the streets, alleys and the public. Especially is this so when the consent must be obtained, not only to construct, but to maintain and operate the lines. Again, it is contended that under the provisions of the act of assembly the city council of Richmond had authority only to consent or refuse permission to the Southern Bell Telephone and Telegraph Company to construct, maintain and operate its line in that city, and that such consent or refusal must have been given without any qualification or condition, whatever. It must have been a categorical 'Yes' or 'No.' But the city council did in fact express conditions and qualifications in giving its consent. It may safely be assumed that, without such qualifications and conditions, consent would not have been given; that they were the reasons and motive cause for the consent."

In the so-called permit to the Southern Bell Telephone and Telegraph Company, in the case above cited, much more was exacted of the grantee than in the grant in the instant case. It is there said:

“It may safely be assumed that without such qualifications and conditions consent would not have been given; that they were the reasons and the motive cause for the consent.”

Paraphrasing and applying the same process of reasoning to the instant case it may well be said, that the city council did insert a reservation giving it the right to terminate the grant whenever it saw fit so to do, that without such reservation it would not have made the grant in the form that the same was made, would have insisted on other and different conditions and restrictions as to the period of duration and rights in the street and that such reservation was the reason and the motive cause for the grant as made.

Hamilton Gaslight and Coke Co. vs. City of Hamilton,
13 Sup. Ct. 90.

Stein vs. Bienville Water Supply Co., 11 Sup. Ct. 892.

Bridge Co. vs. U. S., 105 U. S. 470.

III.

**THE GRANT IN QUESTION DID NOT AUTHORIZE THE
GRANTEE OR ITS ASSIGNS TO USE THE STREETS,
TO DISTRIBUTE CURRENT FOR POWER PURPOSES.**

This question, we think, should be determined from the language of the grant. It appears not to be uncertain or ambiguous. It says just what at that time was

meant, desired and intended. It would seem difficult to use or adopt phraseology more explicit and admitting of as little uncertainty.

However, it has been and doubtless will be contended that the language of the grant, as respects its purpose, was inapt in its terms and ambiguous. That part of the grant and its language, so far as necessary to an understanding of this aspect of the controversy follows:

“That the New Omaha Thomson-Houston Electric Light Company or assigns, is hereby granted right of way for erection and maintenance of poles and wires with all appurtenances thereto, **FOR THE PURPOSE OF TRANSACTING A GENERAL ELECTRIC LIGHT BUSINESS,** through, upon and over the streets, alleys and public grounds of the City of Omaha and on and under such reasonable regulations as may be provided by ordinance.” (Trans. R. p. 56.)

“**FOR THE PURPOSE OF TRANSACTING A GENERAL ELECTRIC LIGHT BUSINESS,**” seems indeed exact and apt and free from doubt, uncertainty and ambiguity. Nothing in the language indicates another purpose. None other should be annexed. But how can it be said that it is ambiguous? Its simple plain reading suggests no doubts, introduces no uncertainties and calls for no interpretation. here is nothing left for construction, it is the best expositor of its own meaning. This seems so conclusively so as to make it extremely difficult to found a protecting argument, indeed, it seems like attempting to furnish the reasons for established maxims or setting forth in terms the equated reasons, if such can be furnished, why two plus two make four. If anything more were needed than the language itself to confine the grant within the terms employed for that purpose, it is readily found in the suggestion that such language is

contained in a grant by a municipal legislative body to a private corporation seeking the right and privilege to build up and advance its interests in the public streets and places of the city, and subject to strict construction in favor of the public.

It is contended that both the city and the company practically construed the foregoing language as containing a grant of authority to the company to distribute current, not only for the purpose of lighting, but for the additional purpose of furnishing power and heat, and other purposes to which electrical current might be properly devoted other than light. It is urged that both parties thereby have practically confessed a purpose and intent in making the grant not readily apparent from the language in which the same is made. Consequently, that the language of the grant is ambiguous, and should be construed and held to be what the parties have apparently regarded it to be in practical operation under it.

It is to be remembered that the practical operation under the grant was by the grantee alone, and covered a period of some twenty years or more and a period of extremely rapid development of appliances and apparatus for the production and utilization of current. Hence, a grant abundantly adequate to furnish to the grantee all needed authority to develop and supply current for all known purposes to which current might be practically applied, at the time of the grant, might prove incomparably inadequate to furnish authority to develop and supply current at the end of twenty years thereafter. Such is the unquestioned situation that presents itself in this case.

In 1884, at the time of this grant, the utilization of electrical current for known commercial and practical purposes was confined to the production of light. This was true as to those engaged in the business of supplying

current and unquestionably so as to laymen generally, such as constituted municipal councils.

It may be that the prophetic vision of some wizard like Edison may have entered the future sufficiently far to justify the prediction that future developments would bring about the commercial and practical use of current for other purposes than light, and it may be that the use of current for other than practical lighting purposes were possible dreams, hopes, and expectations of the scientific recluse as he worried, worked and dreamed in his shop or laboratory; but be this as it may, it is more than certain that the practical man pursuing the common affairs of life, and even those engaged in the practical utilization of electrical current and the development of apparatus and appliances for its production and employment knew nothing of and cared nothing for such dreams, prophecies, hopes and expectations.

This is practically admitted by the appellant in its bill filed in the circuit court, because it is therein pledged in the eighth paragraph thereof as follows:

- “(8) Plaintiff further avers that in the year of 1884 and for some time thereafter the use of electric current for producing power and heat had not been extensively developed.” * * *
(Trans. R. p. 4.)

This was the theory of the plaintiff's action and it was the basis of its contention, that because of the little known and limited employment of electric current in the production of power, this aspect of it received no special attention in the wording of the grant in Ordinance 826. Appellant's evidence in the lower court is to like effect. At page 32 of the transcript of the record, Henry Holdredge, a witness for appellant, testified:

"The application of electric power to stationary machinery was not much understood or developed in 1884 and for several years thereafter." * * *

On page 28 of the transcript of the record, Edward F. Schurig, another witness for appellant, testified:

"In the year 1884 the use of electric current had not been extensively and practically applied to mechanical devices, for translating its energy or force into power, for the operation of machinery and was employed only in a small way and where small power was required." * * *

On page 36 of the transcript of the record, William F. White, another witness for appellant, testified:

"The application of electric energy to stationary machinery was not much understood or developed in 1884 and for several years thereafter; but new inventions and devices have been produced for the translation of electric energy to such an extent that the business of furnishing electric current has been very greatly developed and the use thereof for the production of power and heat has become very important to the public." * * *

On page 105 of the transcript of the record, Walde-mar Michaelsen, one of the defendants, City Electrician of the City of Omaha, and a witness testifying on behalf of the defendants, testifies:

"Affiant further states that in 1885 and 1886, electricity was not used for heat and power purposes to any considerable or practicable extent, and that its use for such purposes was not sufficient to render it a merchantable or commercial commodity, for those purposes, and electricity was not then recognized by persons familiar with its use and possibilities as being practicable for heat and power purposes."

All these witnesses testifying were men whose life work involved the study of electricity and an acquaintance with its developments and use. Most of them had been engaged in that work during a larger part of the time from 1884 to the time of testifying, and all agree that in 1884, at the time of the grant herein the devotion of electrical current to practical heat and power purposes was little known, and by this expression, "little known," must necessarily have meant little known to those whose business it was to know and to understand the practical commercial utilization of electrical current to the various purposes in which it was employed.

If this be true as to those whose business it was to know, how can a conjecture or a prediction be entertained that the ordinary man pursuing the ordinary affairs of life had any acquaintance with the practical or commercial employment of electrical current for power and heat purposes? All these witnesses concede that electrical current had been employed successfully and commercially and practically in the production of light and that such purposes constituted the main objects and purposes of its employment at the time of the grant in question. How can it then be fairly and reasonably contended that in the use of the terms, "*for the purpose of transacting a general electric light business,*" the city council of the City of Omaha intended or even had in mind the purpose of granting to the grantee in Ordinance 826 the authority or right to construct poles, string wires and distribute current to be used and employed in the production of power and heat? Why is it not only fair and reasonable to claim that such unknown purposes were not comprehended within the grant? Such seems to be the only contention that the language of the grant will support, it is the only contention that can possibly be supported from the known facts as they existed as that time. The

scope of this grant and its objects and purposes ought to be construed, if the language thereof admits of such construction, with reference to the facts, conditions and knowledge as the same existed at that time. If a thing or use were not known, and not within the terms used, it will not be imported in by construction. Some justifying reasons ought to exist for such construction and all justifying reasons should not forbid, as they do in this case, such construction. The grantee itself, at that time knew little or nothing of the employment of electrical current to power and heat purposes, the grantors knew nothing whatsoever; the grantee knew that electrical current had been and could be successfully used in production of light, the grantors doubtless knew the same, the one intended to secure authority to distribute current for the production of light, the other intended to grant authority for that purpose, nothing more was desired and nothing more intended by the grant.

True, later developments and inventions in appliances and machinery for the production and utilization of electrical current demonstrated the successful and practical employment of current for heat and power purposes and demonstrated that it was profitable; but the meaning of the language and the objects and purposes of the grant surely are not to be determined by developments little known at the time and less understood. Otherwise, twenty years from today may bring forth developments that would call for a construction of this grant, and its authority, for purposes not even dreamed of or suggested by the past history and developments of electrical science. Its possibilities seem hedged about by infinity only and prophecy and prediction of today may not begin even to measure demonstrated certainty and accomplishment of even a few years of future development.

We cannot believe that the council intended to grant the right to string wires, set poles and install appliances throughout the public streets of the city and to furnish current to accomplish every purpose which might be suggested by future developments and needs. The council could at that time reasonably calculate the extent to which the streets of the city and public places might be necessarily occupied by wires, poles and apparatus in the production and distribution of current for light; in the very nature of things, need for lights is and will be limited and the requirements for its service could be anticipated; but who can say in the light of known facts at the time, that it was possible reasonably to calculate, even conjecture, as to the extent that the streets and public places would necessarily be occupied in the production and distribution of current to all purposes to which it might be devoted, to meet future developments? Even now, who can say to what extent such developments may make it necessary to occupy the public streets? Seemingly these are suggestions which insistently demand that the language of the grant and its objects and purposes be construed and determined, if open to construction, by the conditions at the time and the known and apparent objects and purposes to be accomplished in the making of the grant. Only known purposes could have been in the minds of the grantors.

When it accepted the grant, the grantee did not suppose it had been given authority to distribute current for power uses.

The grantee never supposed, until years after it had accepted the grant, that it had obtained a grant for any other purpose than that of distributing current for light. At that time it apparently had no thought or belief that developments would make profitable employment out of the distribution of current for other than light purposes.

This must be so, because it willingly accepted a grant limited in language and purpose to such object. It organized and incorporated after the grant had been made and in its organization expressed the purpose for which it was organized, and therein furnished the conclusive telltale evidence of its understanding of the language and of the extent of the authority granted to it in Ordinance 826. The grantee in said ordinance incorporated to carry forward the business authorized by that grant. It must be held that it organized for the purpose of carrying out fully the objects of the grant as it understood them and of transacting the business which it believed it was authorized to carry on in the streets of defendant city, and became endowed with all the powers from the state necessary to carry out the obligations which it understood had been assumed by the acceptance of the grant. No other view would be consonant with good faith. If it understood that it had been granted authority from the city to do more than that which its own organization voluntarily entered into by it after the acceptance of the grant authorized it to do, then it could be charged with double dealing, acting in bad faith and seeking to escape the performance of obligations which it had voluntarily assumed. Of course, no such conduct on its part will be presumed, and as a matter of fact, the foregoing suggestions are idle simply because no such authority was ever granted, no such obligations ever accepted or imposed and no thought of any such right of power even entered the grantee's mind. All claims of right to distribute current for power purposes are afterthoughts and are made because a profitable business had been builded up in the distribution of current for power.

Note the purposes for which the grantee in said ordinance 826 incorporated. It was preparing to perform the grant long after it had been made. Its article 3 of

its Articles of Incorporation, filed with the secretary of State of the State of Nebraska on the 28th day of September, A. D., 1885, and nearly a year after the grant in ordinance 826 had been given, provides:

“The general nature of the business to be transacted by said corporation shall be to purchase electric light plants, privileges and franchises, and sell or dispose or otherwise dispose of same; to construct lines of wire for the transmission of electric current from central stations through such wires, or otherwise, to produce light for the illumination of streets, public and private buildings, and for all other purposes for which such light may be used; to enter into contracts for the furnishing such electric light to cities, towns, corporations or individuals; and to furnish the same for the purposes aforesaid or for any and all other lawful purposes anywhere within the state of Nebraska, to rent, sell or otherwise dispose of all classes of electric appliances; to purchase such real estate, erect such buildings, purchase, construct and use such machinery and purchase, lease, hold, use and dispose of all such other property and material of every kind and description as may be necessary or incidental to the prosecution of said business anywhere within the state of Nebraska.” (Trans. R. p. 102.)

Such were the purposes which the grantee prepared to perform. Nowhere is it authorized to generate and distribute electric current for other purposes than the production of light. We are not attempting to question the exercise of the extent of power given by the state. We concede none but the state could do this. We are simply urging the probative force that such circumstances should have in arriving at what was understood by the parties at the time of the grant. In stating the purposes of its organization and in obtaining authority from

the state the grantee no doubt had in mind the full performance of the purposes and objects given in the grant from the city. Had it understood or thought that the city had authorized it by such grant to distribute current for power and heat purposes, it surely would have provided in its articles for the performance of the enjoined duties. Indeed, had it even known that electric current might be successfully, practically and commercially employed in the production of power and heat, or had it even suspicioned later developments in this respect, it no doubt would have empowered itself to engage in such business. Surely it would have been easy and a simple matter to make such provision. The state would have authorized it to conduct such business, if it had such in mind, on mere request. It could have obtained authority in that respect as easily as it could have obtained authority for distributing current for lighting purposes only, as it did. It did not do so. The explanation must be that it didn't have in mind the purpose of engaging in any such business: First, because it didn't consider the grant in said ordinance as authorizing it or requiring it to distribute current for heat and power purposes; and second, because at that time and at the time of its incorporation it didn't know of any such practical use, and the facts are that electric current had not been commercially, successfully and practically employed in the production of power and heat.

As we have said, this devotion of current commercially, successfully and practically in the production of power and heat was a development of successful experiment, invention and manufacture of appliances in the translation and utilization of electrical current. It was development having practically its origin and growth in time subsequent to those of the grant. Hence, in construing the language of this grant, if any construction

is called for, it will be construed with reference to the known conditions at the time thereof.

There is no room or occasion for construction of the language of the grant. It is neither uncertain nor ambiguous as to the purposes for which authority was granted.

Whether this grant is regarded as a contract between the city and the grantee or in any other light, its meaning should be determined by a strict construction of the language therein, if the language is clear and free from uncertainties it will be held to mean exactly what its terms import. If the language is ambiguous and uncertain and the meaning freighted with doubt and such doubt and uncertainty persist after a fair consideration of the language employed and of the circumstances and facts as they exist and were known to the parties to the grant, then under all the rules of construction which should be applied, such doubt destroys the grant, and the grant will be confined to those purposes and objects clearly expressed and will not be held to authorize doubtful and uncertain objects and purposes, even if such might be said to appear.

There can be justification for the construction of the language of a contract or grant only in the event of ambiguity or uncertainty in the use of the language employed therein, and then the purpose of the construction and its sole object is to determine what the contract is as made, in the first instance, that is, to determine what was intended by the parties thereto at the time of making; and not for the purpose of determining what the contract may appear to be as worked out by the parties or either of them to it throughout the many years of its operation. The mere suggestion, it would seem, that many years of

practical interpretation and working out of the contract becomes necessary to determine what the contract was or was intended to be in the first instance had ought, under all rules of strict construction which the city is entitled to invoke, defeat the claim of the appellant that the language of the grant and its terms gave to the grantee a right to distribute current for the production of power and heat. This admitted condition suggests such substantial lingering and persistent doubt as ought to, under all the rules of strict construction defeat any such claim respecting the grant in question. It might be claimed that the city has estopped itself because of its conduct with reference to the practical working out of the business transacted under the grant. But if this be so, it involves another and entirely different principle than the one under discussion, to be presented in a later part of this brief.

It is in *Blair vs. Chicago*, 201 U. S. 400-463-467-471:

“ * * * One who asserts private rights in public property under grants of the character of those under consideration, must if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied.” * * *

“While it is incumbent upon those claiming under a public grant, as we have already stated, to make out the rights contended for by the terms which clearly and unequivocally convey them, it is enough to deny the privileges contended for, if, upon considering the act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred.” * * *

“Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or pur-

posely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give." * * *

"Words of equivocal import," said Mr. Chief Justice Black, in *Pennsylvania Railroad Company vs. Canal Commissioners*, 21 Pa. St., 9, 22, 'are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature.' 'The just presumption,' says Cooley in his work on *Constitutional Limitations*, 7th Ed., p. 565, 'in every such case is that the state has granted in express terms all that it designed to grant at all;' and, after quoting from the Supreme Court of Pennsylvania to the same effect, the learned author observes: 'This is sound doctrine, and should be vigilantly observed and enforced.' "

Let us again observe and insist that the terms "*general electric light business*," used in the grant, are not words of uncertain import. The word "light" is the significant word in this phrase. It can mean but one thing and that one thing is best defined by the terms itself. It doesn't now and didn't then mean power or heat. Whether regarded as an adjective limiting the term business or regarded as a part of the name of the business to be transacted, it all comes to the same thing, and that is that the business to be transacted under the grant was a "light business," a business confined to the production and distribution of electric current to produce light. If it can be properly said that this term included the business of producing power and heat, then could it not be with equal propriety said that it included the running of cars, the manufacture of machinery, etc. The

mere fact that the same apparatus and machinery and the same current of electricity might be employed in the production of current for power as well as heat, seems without significance, because it may and doubtless would require more apparatus and machinery and distributing agencies in the production and distribution of current for power, heat and light than in the production and distribution of light only. To produce and distribute current for power and heat would be an additional servitude. The thing granted was the authority and privilege to occupy the streets for a distinct and named purpose. The city was willing to grant the right and authority to occupy the streets for this purpose and to the extent that it might become necessary to accomplish that named purpose. It named the purpose distinctly and every presumption is that it was unwilling to grant the authority and privilege to occupy the streets with apparatus, poles and wires to distribute current for any other purpose, even assuming other uses were known at the time. As we have said hertofore, the city authorities might reasonably predetermine the extent to which it would be necessary to occupy the streets with apparatus to distribute current for lighting purposes, at the time of the grant or at any time within the life of the grant, and were willing to permit the occupancy thereof to such extent. From this, no presumption ought ever to rise that the city would be willing to allow a corporation to occupy its streets with poles and distributing apparatus in the production and distribution of power, heat and like purposes, because it is a fact indisputably so that the occupancy of the streets and public places of a city to supply it light must be immeasurably increased in order to supply it with both light, heat, power and like purposes, though the current for such purposes is supplied by one concern. The test is not to be found in the claim that the service is bene-

ficial to the public, and therefore desirable—such claim could be conveniently used to justify any trespass.

The Circuit Court, in which this cause was tried, adopted these views of the city, and in a memorandum opinion appearing in the transcript of record at pp. 106-109, at p. 108, among other things, says;

“The ordinance in question is not, to my mind, ambiguous, but plain and specific, limiting the grant to general electric light purposes. In construing contracts and ordinances of this nature the general rule is that they should be construed strictly in favor of the public, yet they should receive a just and rational interpretation, and the court endeavor to ascertain from the language used the true intent and meaning of the parties. To do this we should place ourselves back to the time of the passage of the ordinance in question, consider the then conditions, and ascertain what the city council at that time intended, and give the ordinance that construction, and not such a construction as private interests may now desire, nor such as public interests, after the lapse of years may desire.”

“The evidence shows, as before stated, that at the time the city council acted, in 1884, the application of electric power to stationary machinery was not much understood or developed, and was not for several years thereafter.”

“I cannot think that, in granting in 1884 the right to transmit electricity through the streets and alleys of the city for general electric lighting purposes, it was in the mind of the city council or any of the parties, or that they for a moment contemplated or intended, that the ordinance in question granted the right to transmit electric current for all purposes and uses to which the inventive mind might in the future apply it, even though such new uses might be equally beneficial to the public. Had such been the intention the word “light” would have been omitted. The word “a general electric light business,” as

used in the ordinance, show clearly an intention to limit the use to which the electric current was to be applied."

We think the conclusion reached by the Circuit Court and the reason stated therefor, as appears from the above extracts of its memorandum opinion are abundantly supported by authority from this court and from the many other courts of the country.

In *Cleveland Electric Company vs. The City of Cleveland*, 204 U. S. 116, 27 Sup. Ct. Rep. 202, it is said:

"The rules of construction which have been adopted by courts in cases of public grants of this character by the authority of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, 'in order that the privileges may be intelligently granted or purposely withheld.'"

We think this case explicitly apposite to the facts in the instant case. The language of the grant in the instant case indicates that it distinctly impressed the legislative mind with one purpose and none other, and that purpose was clearly and unequivocally stated in the terms of the grant.

In *Charles River Bridge Co. vs. The Warren Bridge Co.*, 11 Peters 496, it is said:

"The rule of construction in all such cases is now fully established to be this: That any ambiguity in the terms of the contract must operate against the adventures, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act."

While we believe that there exists no ambiguity or uncertainty in the language or terms of the grant here in question, yet assuming that, as appellant claims, such to be the fact, the very claim, if established, defeats the grant. If, for instance, as claimed by appellant it takes some twenty years of alleged practical construction by the parties to determine the meaning and purpose of the language and terms of the grant, then this situation defeats the grant, under the authority just cited.

In the above case it is further said:

“This was a fair case for an equitable construction of the act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still, the right to exact toll could not be implied, because such a privilege was not found in the charter. * * * It would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in the nature of monopolies, and confining corporations to the privilege plainly given to them in their charter, the courts of this country are enlarging these privileges by implication; and construing a statute most unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of Justice.”

In *People ex rel vs. Deeham*, 153 N. Y. 528, 47 N. E. Report 787, it is said:

“The rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication except it be

necessary to carry into effect the obvious intent of the grant. But the obvious intents of the parties, when expressed in plain language cannot be ignored in a public any more than in a private grant. A construction that would lead to false consequences or unjust or inconvenient results, not contemplated or intended should be avoided in a grant as well as in a statute."

Authority to furnish current for power and to use the streets and public ways for that purposes is a servitude distinct from that to use the streets for furnishing current for light.

We pause here to suggest that the consequences to fall from a successful assertion of appellant's claim to furnish power under the grant would lead to unjust results against the city, and such as were not contemplated or intended by the grant. The right to furnish current for power and other purposes, and to set poles and string wires through public places for that purpose, is as distinctly a servitude as a like right to distribute current for light. The municipal authorities may have granted such rights, if they had so desired, but the right could have been conditioned as the authorities may have seen fit and as might be proper. If it is to be held that such authority was given the grantee and that without time limit, it requires no effort to understand that the city has been bound hand and foot and turned over to the grantee to be dealt with as its avarice or mercy might dictate. That such consequences were intended by the grant in question or is a proper implication from the language of the grant, is unthinkable, and the claim well nigh monstrous.

Abbott Municipal Corporations, at section 907, says:

"The rule of strict construction applies, as stated in a preceeding section, and where, therefore, a grant of the right to use the public highways for the purpose of supplying either water, light or power is not general in its terms but describes in specific language the particular business which can be legally carried on by the grantee of the right, that grantee cannot lawfully engage in supplying another commodity resulting in the same benefit, or put the articles which it is authorized to supply for a designated purpose to another purpose; neither can the grantee of such a license or contract increase the number of commodities supplied by him though in a general way the business of furnishing them is similar in character. The application of these rules forbids a company authorized to supply electric light from furnishing electric current for power though generated by the same plant and conveyed by the same wires or some of them. Neither can a company authorized to supply water or light alone engage in the business of supplying both water and light. The rule also prevents a corporation organized for the purpose of manufacturing and selling artificial gas from using natural gas for the same identical purposes, and one authorized to furnish gas from supplying electricity. As a rule where a grant is made for a supply of a specific commodity, that grant is not impaired by the giving of a license to other parties to furnish a commodity resulting in the same benefit."

In Chicago General Street Railway Company vs. Elliot, 88 Fed. 941, it is said:

"I cannot assume, from this correspondence that the city understood that these additional wires were to be used for the conveyance of the electrical current to private consumers. The applicant was a street railway company, not a company generally furnishing electrical power. The privilege asked made no

mention of anything other than the heat, light and power needed in the operation of the street railway. An application for a permit to string wires for distributing electrical power to private consumers could have been so easily framed in apt language to cover the purpose required that the absence of such language implies the absence of such purpose. It is not at all certain that the city would have granted these additional rights to the complainant had they been specifically asked for. It would have implied larger voltage upon the wires, or a larger number of wires than the operation of a street railway line demanded. Either increased voltage or increased number of wires are objections, and might, on that account, have been refused. Upon this view of the case, the complainant is without any permit from the city to use these feed wires for the purpose of distributing power to private consumers."

In *Scranton Electric Light Co.*, 112 Pa. 154, 15 Atl. 446, the court said:

"Applying, then, the rule here stated to the case in hand, we cannot pronounce the conclusion of the master and court below to be erroneous. In the case above cited, the sharpest technicality of construction was adopted in order to defeat the extravagant demand of the corporation claiming the exclusive privilege to furnish the city of Pittsburg with natural gas for the purposes of fuel. But in the case before us it is apparent that the legislature did not, in the making of the act of 1874, intend to embrace lighting by electricity. It is true that the language of this statute seems at first sight to be broad enough to embrace all methods of lighting and heating then known, or that might thereafter become known; yet, we suppose, it will not be contended that the intention was to grant to this company the exclusive privilege of furnishing to the citizens of Scranton wood, coal, oil and

other well known and ordinary materials for lighting and heating. Not, indeed, that the law makers could not have conferred such power, but because it is not probable that they intended to confer a power so unreasonable."

A practical construction of a grant by the parties to it contrary to the language thereof or not justified by it will not control the courts in a proper construction thereof.

It is urged that the parties have placed upon the grant what will be probably termed a practical construction in working it out. That such practical construction requires the grant to be construed as one intended to give authority to furnish current for heat and power purposes, as well as light, and to install and maintain in the streets the necessary and proper appliances and fixtures.

Of course, it goes without saying that only one of the parties, the grantee, has been active in carrying forward the work under the grant. The city hasn't been a party to this end of the work. The evidence wholly fails to show that the city at any time was ever called upon or required to construe this grant or to give its understanding of the meaning or purpose of the same. It is true that from time to time, since the same was made, it in its legislative and administrative capacity caused to be passed certain regulatory ordinances, regulating the manner and method which all companies in furnishing current should perform such services, to the end that the convenience and safety of the public was properly taken care of; and has caused such ordinances to be observed through its appropriate officers. It is also true that the evidence shows that in a few instances the city has pur-

chased current from the grantee and used the same in the production of power; that it has exacted royalties on gross earnings of the grantee from the sale of current and that it has passed ordinances requiring all persons engaged in developing and distributing electric current for heating, light and power purposes, to place the same underground, in certain designated portions of the city.

It is claimed that this conduct on the part of the city constitutes a construction of the original grant to the company that authority was given to distribute current for power purposes.

The actual facts are, and the evidence of the record shows it, that for some five years, at least, after the grantee entered upon the grant, it had no occasion to and did not distribute current from its plant in the production of power. During that time it simply generated and distributed current in the production of light. It appears that at or about that time devices were perfected so as practically and profitably to convert current into power and a demand arose in this part of the country for current for such purposes. Without consulting the city or its officers or without any intimation or question about its right so to do, the grantee began supplying current for such purposes and continued to supply current and to enlarge its plant and increase its fixtures and appliances in the streets, in order to enable it to supply current for power purposes. There is no evidence that the city knew at that time or for a long time thereafter that current was being supplied for any such purpose. The city was not called upon to give its construction of the rights and authority of the grantee under the grant. The grantee simply assumed it had the right and acted accordingly. It placed its own construction upon the meaning of the grant. No action upon the part of the city induced it to place one or the other construction thereon.

It simply gambled on the extent of its rights. Doubtless, when the officers of the city first ascertained the fact that current was being supplied by the grantee for power purposes they assumed that the grantee possessed such a right and made no investigation to verify the accuracy of such assumption. So, likewise, in all that was done by the city thereafter, until the resolution in question in this action was passed it was no doubt assumed that the company possessed the authority which it claimed and which it was asserting it had. The evidence fails utterly to show any practical construction placed upon the grant by the city. It wasn't called on to construe the grant. It did not understand that any construction was necessary.

But even if the parties had placed what might be termed a working or practical construction upon the grant, other and different from its plain terms, and the plain terms were free from uncertainty and doubt, then the so-called practical or working construction, even if made by the parties is immaterial and will not furnish suggestion much less control the court in the construction of the effect of the powers plainly given. Otherwise, no check or control could possibly be imposed or exercised over the conduct and acts of public officials. The cases seem numerous and uniform on this point.

In *Citizens' Fire Insurance Co. vs. Doll*, 35 Md. 89, the court said (page 107):

"As it was said by the Supreme Court in the case of *Railroad Company vs. Trimble*, 10 Wall. 367, where there is doubt as to the proper meaning of an instrument, the construction which the parties to it have themselves put upon it is entitled to great consideration; but where its meaning is clear, an erroneous construction of it by them will not control its effect. *Fogg vs. Mid-*

dlex Mut. Fire Insurance Company, 10 Cush. 337."

In *Railroad Co. vs. Trimble*, 10 Wall. 367, it is said (page 377):

"Where there is doubt as to the proper construction of an instrument this feature of the case" (the practical construction of the parties) "is entitled to great consideration. But where its meaning is clear in the eye of the law the error of the parties cannot control its effect."

In *Davis vs. Shafer*, 50 Fed. 764, it is said (page 768):

"Where the contract in question implies words or terms of doubtful or ambiguous meaning and application, the meaning and application given them by the parties to the contract and acted on by them should prevail over any technical, grammatical or logical interpretation of the words and phrases, but where the contract is free from ambiguity and 'its meaning is clear in the eye of the law,' such evidence is clearly incompetent."

In *Rogers vs. Colt*, 21 N. J. Law. 704, it is said (page 708):

"The contract must undoubtedly be construed according to the intention of the parties. But that intention is to be gathered from the contract itself. If there be no ambiguity in the contract; if the contracting parties have declared their intention in plain and unequivocal language, there can be no construction against the words of the contract. We may not alter the terms which the parties themselves have adopted, or make a new contract for them. Construction must be agreeable to the common un-

derstanding of the terms used, without regarding technical meaning or grammatical propriety. And it must be upon the whole contract, so that one clause or phrase may qualify, enlarge, restrain or even totally defeat another."

In *Morris vs. Thomas*, 57 Ind. 316, it is said (page 322):

"There is no room, it seems to us, in the phraseology or verbage of this clause, for construction or interpretation. It is plain, certain and free from ambiguity. It contains not a word or expression of doubtful or indefinite meaning. There is but one technical word in the entire clause, and the meaning of that word is fixed and made certain by means of its context. If there was any obscurity, uncertainty or ambiguity in the terms of this contract, then the acts of the parties in connection therewith, as suggested by appellant's counsel, would furnish valuable aid in the construction of the contract. But where, as in this case, the terms of the contract are plain, intelligible and free from doubt and uncertainty, rules of construction are unnecessary and of no possible service. In such a case it is certainly not the province of the courts, by any rules of construction, to make another and entirely different contract for the parties from the one they made for themselves."

In *Western Railway Co. vs. Missouri Iron Co.* 91 Ill. App. Rep., it is said (page 38):

"While the interpretation by the parties to a contract as evidenced by their acts, will, in cases of doubt, be resorted to for the purpose of arriving at the true intention of the parties to it, this rule is never allowed to govern when the effect would be to overthrow the plain terms of the contract."

IV.

THE CITY OF OMAHA IS NOT ESTOPPED TO QUESTION EITHER THE DURATION OF THE GRANT OR THE RIGHT OF APPELLANT TO MAINTAIN ITS FIXTURES AND APPLIANCES IN THE STREETS THEREOF FOR THE PURPOSE OF DISTRIBUTING CURRENT FOR POWER.

The claim of estoppel, as to all of its aspects, rests upon the same facts as those with reference to the practical construction claimed, and need no separate statement here.

In an earlier part of this brief we have pointed out some of the things appellant claims should work an estoppel, such for instance as the enactment of general ordinances having for their purpose the regulation of the manner which all companies engaged in the distribution of electricity in the city should observe. (59-70, record, same pp. 71-90, same pp. 91-95.)

The manifest object and purpose of these ordinances were to protect the public from dangers incident to the business of supplying and distributing high tension electrical currents. There was no purpose or intention thereby to give or grant a right where none existed.

The city also passed an ordinance and amendments to it requiring all persons and concerns maintaining electric wires and poles for any and all purposes, and within certain prescribed sections or districts of the city, to place the wires under ground, with some exceptions. (R. pp. 96-99).

This ordinance, too, was a general ordinance simply

intended to regulate and lessen the dangers connected with such business and having no purpose or intent to grant a power where none had been granted, and applying generally to all persons or concerns engaged in such business.

The city did in its street lighting contracts, and as a part consideration therefor, exact of the appellant company a certain bonus or royalty on its gross receipts from all sources derived from the sale of current and that the manner of the payment thereof shows, from time to time, that the royalty was made up in part from the sale of current for power service. (R. Exhibits "B," "C," "D," "E," "F" and "G," pp. 44-48.) The city also purchased some current for power purposes from appellant.

These are the facts in the record which it is claimed work an estoppel against the city. It will be observed that the first attempt of the city to regulate the manner of carrying on any such business was not undertaken until the latter part of 1892, when Ordinance No. 3391 was passed. (R. p. 70.)

The grantee had been operating the plant some seven years, during the latter part of which period it had commenced the furnishing of current for power purposes, and the appellant continued the same. The ordinance requiring the appellant to place its power wires under ground within certain districts of the city, came after this time. And the contracts exacting royalties from the appellant with reference to its earnings seems not to have been made before 1902; and the contracts of the city for current from the appellant to be used in the production of power was entered into not earlier than 1902. For some time prior to any of these acts, the grantors of appellant had undertaken the furnishing of current for power and had made the necessary outlays to perform

the service. Certainly it cannot claim that it was induced or lead to do so by reason of any of the facts above set forth or by reason of any of the testimony in this record. None of those things had been done by the city. There is no evidence that the city knew or had any occasion or reason to know that appellant's grantors were assuming the right to distribute current and were actually engaged in the distribution of power current, before 1892. There cannot be a shadow of claim that the city's conduct induced the appellant or its grantors to enter upon this service or that such services were entered upon with any understanding with the city that the grantee possessed such right or that its conduct in furnishing the service and making the investments necessary would not be interfered with. It knew and was bound to know as much about its right under the grant as the city. It was bound, at its peril, to know the extent of its authority under the grant. It was bound to know that its acts were unlawful providing it did not have the authority to install its distributing apparatus in the public streets to deliver current for power purposes. It was bound to know that mere acquiescence by the city officials or mere nonaction on their part would neither constitute an estoppel against the city or operate as a grant of authority where none had been otherwise given. If it cared to gamble with chances and to take upon itself the risk of investments made necessary by an unauthorized venture, then it is in no attitude to whine when the lash of just visitation is brought to bear upon its venturing back.

The passage of the ordinance above mentioned and the doing of the acts and things as disclosed by the record as above instanced should not work an estoppel against the city. These measures were enacted in the interest of the public safety and convenience and were general in their nature and applied to all concerns engaged in the same

business. All these things could be consistently done and could as consistently apply to those in the streets at sufferance or at will, as to those there by right of grant. There was no purpose to induce a continuation of that service or to induce a larger service of that kind through additional investment. The authorities seem agreed that estoppel arises only where the acts and conduct of the party to be estopped may justly be said to have induced the other party to the transaction to pursue a line of conduct which he would not have otherwise pursued, and which would be unconscionable and inequitable to allow the inducing party to repudiate. The idea of intended deceit or deception seems necessarily involved. If one party to a transaction knew or had the means of knowing as much concerning his rights and authority as the other, then it would be his duty to know and no report, statements or conduct by the other party can justly be claimed to have caused him to alter his position to his disadvantage, in other words, to be estopped.

The Circuit Court of Appeals in this case distinctly held that the mayor and council were without authority or power, even if they had so intended, to give a perpetual franchise to the grantors of appellant. There being a total want of power in the city in that respect, no conduct, whatever it might be, could work an estoppel against it to question the duration of the grant.

The Circuit Court in this case held, on the question of estoppel that the city's conduct, as shown by the record, did not work an estoppel against it, and in that connection said:

“No representations or conduct upon the part of the city are shown which would constitute an estoppel. Whether the ordinance granted authority to transmit electricity for other than lighting purposes was as well known to complainant and

its predecessors as to the city, and the essential elements to constitute estoppel are not shown."

Crary vs. Dye, 208 U. S. 515.

"Nor do I think the payment by complainant, and the receipt by the city of a percentage upon complainant's gross income, derived from the sale of electricity for power as well as lighting purposes, constitutes a valid ratification of the assumed authority of complainant. The law, I think, fundamental, that a power required to be given by a city by ordinance can only be modified or enlarged by ordinance. The payments made by complainant were merely voluntary payments, made with full knowledge of all facts and its legal rights, and upon no representations or conduct by the city which estopps it from denying that complainant's rights are greater than those expressly stated in the ordinance of 1884."

Williams vs. Summit County, 123 Pac. 938.

We believe that no case will be found or cited holding that a municipality can estopp itself from questioning the right of a franchised person or concern to exercise claimed authority, where there is a total want of power in the municipality to give the claimed power. That an estoppel can arise only where the municipality has the right or authority to confer the power, but because of the failure to observe prescribed methods in its grant or gift, it has ineffectually delegated the power, but has permitted the intended grantee thereof or induced it to believe that the power has been given in a proper way and has induced it to alter its position, to invest large sums of money, or to make contracts relying upon the belief that it has been properly given such authority. In such event, an estoppel may properly arise. In other words, *estoppel can never and does never supply the want of power.*

Moreover, estoppel, like forfeiture, is not a favorite of the law, and this should be especially so when applied

to the acts and transactions of municipal authorities. The officers of a municipality are not acting for themselves but for their principal, the city. Their interest is less direct than it would be if acting for themselves. The inducement to act differently in a representative capacity, than in an individual capacity, might be far greater. Their rights and authority to act within the law are defined and limited. Consequently, mere nonaction or failure to act should never be held equivalent to their action required to be performed in a prescribed manner. Therefore, we find the authorities holding as follows:

In *Louisville Trust Co. vs. City of Cincinnati*, 76 Fed. 269, 316, the following is a part of the opinion in that case:

"It has been urged that the expenditure of great sums of money necessary to change the motive power from horse to electricity, a change made under resolutions of the board of public works after the expiration of the grant for 'Route No. 8,' and the grant of June, 1871, estops the city from denying the rightful occupation of the streets by the company, and operates as an extension of the expired grants. The resolutions referred to simply consented to the substitution of electricity for animal power. The consent was not given by ordinance and was not intended to extend any franchise. It was a consent granted under the act of March 30, 1877, which provided that no other motive power should be used upon any street railroad held, or acquired thereafter, by inclined plane railroad companies, without the consent of the board of public works in any city having such a board. The Supreme Court of Ohio held that the Cincinnati Inclined Plane Railroad Company was legally using electricity as a motive power; the board of public affairs, the legal successors of the board of public works, being empowered to permit such change by act of March 30, 1877.

* * * Under the statutory law of Ohio, no street franchise of such a company could have been granted, renewed or extended, at the date of the resolution passed by the Cincinnati board of public works, or that passed by its successor, the board of public affairs, except by an ordinance passed upon the recommendation of the board of public affairs. * * * The city was but a trustee, acting for the public in respect of the granting of street easements. The mode in which it might grant such street rights was specifically prescribed by law. It was not, therefore, competent for the board of public affairs to extend such an easement without the concurrent action of the legislative branch of the government, and the mere nonaction of the municipal government after the expiration of a part of the street grants under which the company was occupying the streets neither creates an estoppel nor operates as an extension of grants, which could only be extended by the ordinance duly enacted. We do not undertake to say that a municipal government may have, under some circumstances, estopped itself from asserting a legal right or denying a liability. Dill. Mun. Corp., Sections 459, 675. This question has been considered, and the authorities cited, by Judge Taft in *City of Detroit vs. Detroit City Ry. Co.*, 60 Fed. 161. But the facts in this case do not, in our judgment, establish an estoppel, and are wholly insufficient to establish a legal extension of either of the expired grants."

In the case of *City of Detroit vs. Detroit City Railroad Co., et al*, 60 Fed. 161, page 164, Judge Taft says:

"It is said that when the new companies took possession the city was under a duty to elect whether it would go on under the ordinance of 1879 or that of 1862, and that a failure to elect, and acquiescence in the ordinance of 1879, bound the city to all its terms. I cannot concur in this view. The grant of May 9, 1893 to 1899 has been held

to be not voidable, but void. There can be no ratification of the void act by mere acquiescence. The defendants, in order to sustain this defense, must show conduct of the city equivalent to a new grant, or rather conduct estopping the city to deny a new grant. The void grant may be used as evidence to characterize and show the meaning of the city's conduct towards the new companies, relied on as constituting the estoppel, but it cannot be used to supply to such conduct any lack of formality which the statute may make dispensable in a new grant."

At page 166 he further says:

"And while Judge Dillon is of the opinion (in which he is supported by many authorities) that an estoppel may be asserted against a municipal corporation to defeat its attempt to oust persons asserting private rights in a public street, he says that such cases are exceptional and must depend on their own peculiar circumstances. But nowhere in this valuable work does he intimate, and no authority has been cited which holds, that a municipal corporation can be estopped in pais to deny a grant in the street to a railway corporation or other person when the statute prescribed for the corporation a particular mode of making the grant."

Again, in the *City of Mobile vs. Sullivan Timber Co.*, 129 Fed. 298, it is said:

"Estoppels are not favored by law, and this would seem especially true when by such estoppel it is attempted, by the omission or indifference of officials, to finally conclude the rights of the public to a public use. The alleged immemorial custom of persons to erect wharves on such broad harbor lines as those of the Mobile River and the adjacent waters, even if clearly demonstrated, can have no legal effect against the assertion by the state of its right to control the

wharf lines of its navigable streams. For a custom to be valid, it must be lawful; and it can never be lawful for the citizen or a corporation to take possession of property belonging to a state, or a municipality created by it, hold it indefinitely, and justify that conduct by proof of custom. Indeed, did the claim of the appellee depend upon a positive and perpetual grant from the city, if given without proper consideration, it would be in this case of no more avail than the acquiescence of the commission or the immemorial custom on which the appellee relies. The rights of the public cannot be divested in such manner. In the case of *Mayor of Jersey City vs. American Dock & Improvement Co.*, 23 Atl. Rep. 682, Chief Justice Beasley, says:

“ ‘Nor would even the joint action of the board and the city give a semblance of legality to the transaction. If the municipal corporation had, by the most formal writing, assented to the commission’s grant, and had joined in it as a part, the instrument would have been an absolute nullity. This result proceeds from the characteristics of the property in question, and which have been heretofore fully defined. The title is vested in the city in trust for the public, and is, therefore, inalienable and indispensable, except by legislative action. The composition of the so-called title of the defendant, it will be observed, consists of the acquiescence and neglect of the trustee of a public use, and the act of a board having no power over the subject. Such a claim seems to be singularly futile.’ ”

In *Philadelphia Mortgage & Trust Co. vs. City of Omaha*, 63 Neb. 280, and at page 207, it is said:

“The authorities are, we think, quite uniform in support of the proposition that the doctrine cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of one of its agents or officers which has been relied upon by a third

party to his detriment. In the case of *People vs. Brown*, 67 Ill. 435, it is stated in the head-notes: "Public policy, to prevent loss to the state through the negligence of public officers, forbids the application of the doctrine of estoppel to the state, growing out of the conduct and representations of its officers. On the same ground that the government is excused from the consequence of laches, it should not be affected by the negligence or even willfulness of any one of the officers." Says Mr. Justice Breese, who delivered the opinion of the court: "It is a familiar doctrine, that the state is not embraced within the statute of limitations unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine be applicable to a state. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government. The doctrine is well settled that no laches can be imputed to the government, and by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even willfulness of any one of its officials." "

This court in the case of *Brant vs. Virginia Coal and Iron Co.*, 93 U. S. 326, has said:

"For the application of the doctrine of equitable estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury."

"Where the estoppel relates to the title of real prop-

erty, it is essential to the application of the doctrine, that the party claiming to have been influenced by the conduct of declarations of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel."

This same doctrine is again announced by this court in the case of *Crary vs. Dye*, 208 U. S. 515.

Appellant cites cases from the Supreme Court of the State of Nebraska and from other courts, claiming that a rule has been established in the State of Nebraska and elsewhere which should be applied to the facts in the case at bar, and which, if applied, would estop the city to question either the perpetuity of the grant or the right of appellant to distribute current for power purposes.

These cases are cited:

Omaha Street Railway Co. vs. Omaha, 90 Nebr. 6.

State vs. Lincoln Street Railway Co., 80 Nebr. 333-346.

Illinois Trust and Savings Bank vs. City of Arkansas, 76 Fed. 271-293.

People vs. Illinois Gas and Electric Co., (Ill.) 98 N. E. 768.

Omaha Street Railway Co. vs. City of Omaha, supra, grew out of the passage and enforcement of the resolution in question. Certain power users intervened and claimed with the company and against the city. The company claimed that it had been given a franchise, which had not expired in the streets for street railway purposes, and that the right to distribute current for power purposes was an incident to such rights. It is claimed also

and the proofs so showed that the city had passed several ordinances giving any person, company or corporation the right to transmit electric current throughout the streets of the city for all uses, upon compliance with provisions of the ordinance and upon obtaining permission from designated officers so to do. That acting under these ordinances the company had complied with the provisions of the ordinance and had secured permission from the designated officer to distribute current for all purposes and had entered upon and continued such distribution believing that it had the authority and right so to do. That the city had recognized this right in the company and dealt with it accordingly. That it had made large investments to carry on and develop this feature of its business. The ordinances under which this claim was made are in general terms and show that such rights had been given to any person, company or corporation who desired to comply with the provisions of the ordinance and obtain the permit.

Under this state of facts the Supreme Court of the state held that the City of Omaha was estopped to question the authority of the Street Railway Company to distribute current, as then established, for power until the expiration of its franchise to use the streets for street railway purposes. Here, ample authority had been given to do the very things that the company had undertaken to do. The ordinances were broad enough to authorize that particular thing. In the case at bar, the appellant claims the right to distribute current for power purposes under Ordinance 826. This ordinance did not authorize the appellant to do the thing which it claimed the right to to by virtue thereof. Moreover, appellant's rights in and to the streets had ceased some years before the passage of the resolution in question, it was there at will or at sufferance. Had the right of the Street Railway Com-

pany, or its colorable claim to the use of the streets for all purposes ceased before the passage of the resolution, then the Supreme Court of this state would not have held the city estopped from questioning the right of the company to distribute current for power purposes.

The case of *State vs. Lincoln Street Railway Co.*, supra, does not decide any question apposite to the facts in this case. It merely announces the rule to be in this state that where a municipality has the power to make a contract, but in making it acts irregularly, but not so irregularly as to destroy its powers so to do, then if both parties to the contract in good faith believe that the powers have been regularly exercised and so deal with each other on that basis for a long period of time and rights accrue to the one which it would be inequitable and unjust to destroy without just compensation, under such circumstances the municipality will be estopped to deny that it did not possess the authority to make the contract or that the same was not regularly exercised.

As to the other cases cited, the facts therein are so widely different as to make the announcement of the rule in those cases and its application uncalled for under the facts of the present case.

It has been persistently claimed in appellant's brief that a wise business policy requires that the franchise in question should be held to be a perpetual one and that it should be held to authorize the distribution of current for all purposes for which current might be beneficial to the citizens, or profitable to the company. It is claimed that the city cannot suffer any evil consequences from a decision to this effect. That it will have remaining the right to regulate the operation of the company and to protect the streets under its police power. That it has the right to fix rates and charges and to regulate the services thereunder. It is believed that these are mat-

ters and questions with which the court will not concern itself. It is sufficient to state that appellant is struggling most desperately to keep this franchise for some purpose. It is here with its property in the streets of the city. It will always be permitted to carry on and conduct its business, whether this franchise is held to be in perpetuity or not. One thing appears sure and that is that under the present grant the city is powerless to exact from the appellant any compensation for the use of the streets and public ways. This, too, is believed to be a matter of no concern to the court.

We believe that the grant is not and never was intended to be a perpetual one. That it did not give to the grantee authority to distribute current for power purposes and

That the opinion and decision of the Circuit Court of Appeals was eminently right and correct and should be affirmed.

Respectfully submitted,

JOHN A. RINE,

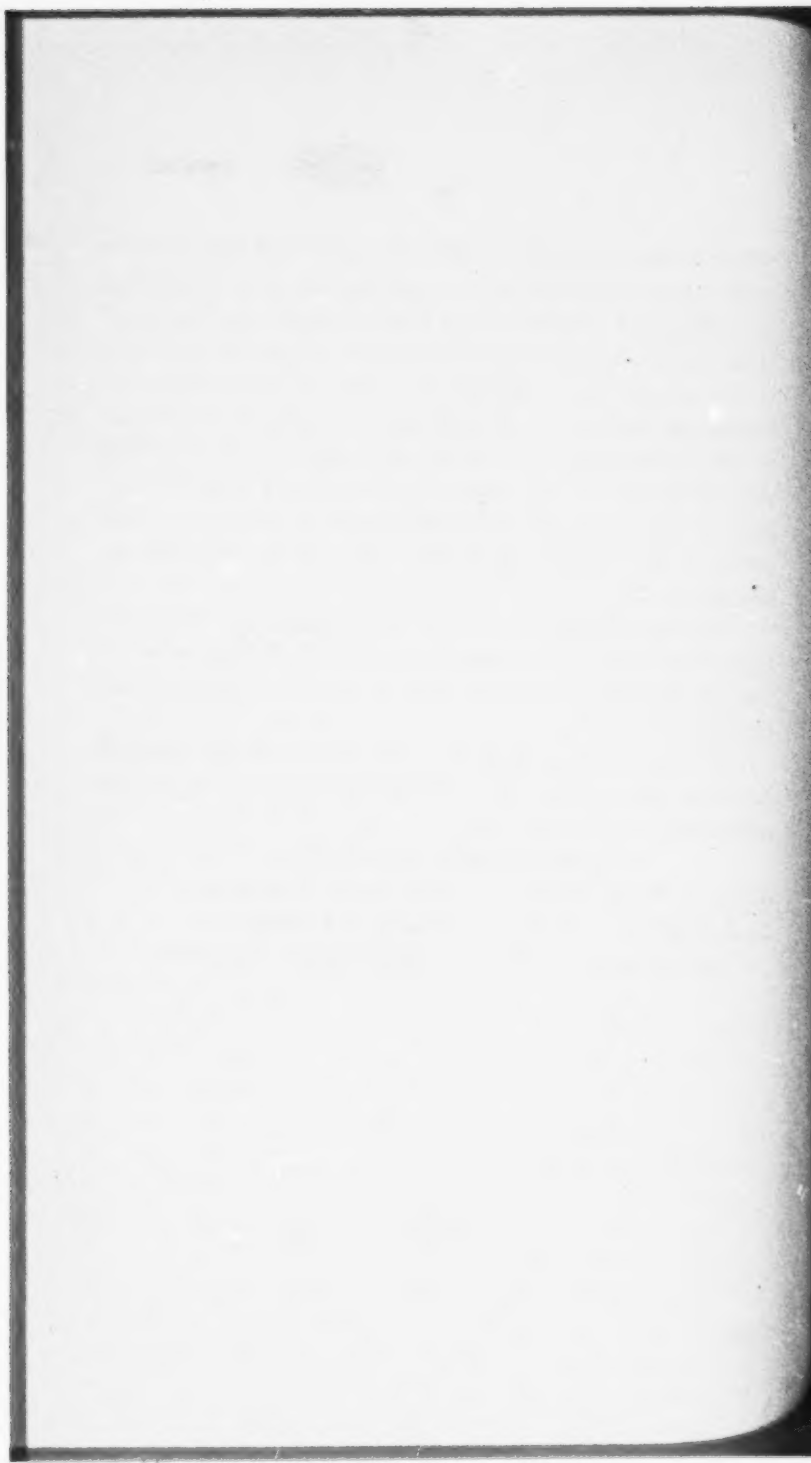
L. J. TEPOEL,

Of Counsel.

WILLIAM C. LAMBERT,

BENJ. S. BAKER,

Counsel for Appellees.



In the Supreme Court of the United States.

OMAHA ELECTRIC LIGHT & POWER
COMPANY,

Appellant,

vs.

THE CITY OF OMAHA AND WALDE-
MAR MICHAELSEN,

Appellees.

**Motion to
Dismiss or Affirm**

Come now the appellees herein by Frank Crawford, I. J. Dunn and John A. Rine their counsel, appearing in that behalf, and move the court to dismiss the appeal in the above entitled cause for want of jurisdiction, because the jurisdiction of the Circuit Court of the United States for the District of Nebraska was invoked solely on the ground of diverse citizenship, and for the further reason that the appellant also invoked the appellate jurisdiction of the Circuit Court of Appeals for the Eighth Circuit and requested a decision upon the merits of its case and secured such hearing and decision, and the decree of the Circuit Court of Appeals is therefore final; and for the further season that if there was a federal

question involved in the case it was one which authorized and required the appellant to bring its case from the Circuit Court for the District of Nebraska direct to this court.

And the said appellees, by counsel as aforesaid, also move the court to affirm the said decree from which the said appeal purports to have been taken, because, although the record in said cause may show that this court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only.

Frank Crawford
J. J. Decker
John A. Rine
Counsel for Appellees for the
purposes of these motions.





IN THE
Supreme Court of the United States

OMAHA ELECTRIC LIGHT & POWER COMPANY, *Appellant*,
vs.
CITY OF OMAHA AND WALDEMAR MICHAELSON, *Appellees*.

BRIEF OF APPELLANT IN ANSWER TO SUPPLEMENTAL BRIEF OF APPELLEES ON MOTION TO DISMISS.

Appellees have filed a supplemental brief for the purpose of calling the attention of the Court to the decisions rendered in *Shulthis vs. McDougal* and *Barryhill vs. Shulthis*, 225 U. S., 565; 32 Sup. Ct., 704. In our view, these decisions support our contention, and refute the position taken by appellees.

The complainant alleges in the bill that he held a lease conveying to him the right to extract the oil and gas from certain lands owned by the heirs of a deceased Indian of the Cherokee Nation, and that the defendants asserted some title or interest in said lands, and in the oil and gas deposits therein, the nature of which claims the complainant was unable to state, and praying that the defendants be enjoined from extracting such oil and gas deposits.

In the opinion, Mr. Justice Van Devanter, speaking for this Court, says:

"A suit to enforce a right which takes its origin in the laws of the United States, is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise *unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law*, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws. (Citing authorities.)

"To sustain the contention that the suit was one arising under the laws of the United States, counsel for the appellants point out the statutes (Acts March 1, 1901, 31 Stat. at L., 861, Chap. 676; June 30, 1902, 32 Stat. at L., 500, Chap. 1323; April 26, 1906, 34 Stat. at L., 137, Chap. 1876, Sec. 22) relating to the allotment in severalty of the lands of the Creek Nation, the leasing and alienation thereof after allotment, the making of allotments to the heirs of deceased children, and the rights of the heirs, collectively and severally, under such allotments; but the bill makes no mention of those statutes *or of any controversy respecting their validity, construction or effect*. Neither does it, by necessary implication, point to such a controversy. True, it contains enough to indicate that those statutes constitute the source of the complainant's title or right, and also shows that the defendants are in some way claiming the land, and particularly the oil and gas, adversely to him; but beyond this the nature of the controversy is left unstated and uncertain. Of course, it could have arisen in different ways, wholly independent of the source from which his title or right was derived. So, look-

ing only to the bill, as we have seen that we must, it cannot be held that the case as therein stated was one arising under the statutes mentioned. As was said in *Blackburn vs. Portland Gold Min. Co.*, 175 U. S., 571, 44 L. Ed., 276, 20 Sup. Ct. Rep., 222, 21 Mor. Min. Rep., 358, a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress."

Manifestly, if the allegations of this bill had, by *necessary implication*, presented a controversy respecting the construction or effect of any Federal law, or of any provision of the Federal Constitution, this Court, under the reasoning of Mr. Justice Van Devanter above quoted, would necessarily have held that the bill did present a jurisdictional question.

This is in entire harmony with the rule announced by Justice Miller in *Cooke vs. Avery*, 147 U. S., 375, quoted on page 11 of our former brief:

"Whether a suit is one that arises under the constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States,"

and on principle supports our contention that under the allegations of our bill, by *necessary implication*, there is involved the question of the impairment of the obligation of the contract arising under the granting ordinance that would result from the enforcement of the provisions of the concurrent resolution ordering the destruction of the wires of the Electric Light Company.

In the supplemental brief counsel suggest that the Federal Constitution is not involved because the Nebraska Constitution contains a similar provision prohibiting the enactment of any law impairing the obligation of a contract. The contention is that even though the allegations of the bill present an issue involving for its determination the application of a provision of the Federal Constitution, nevertheless jurisdiction does not obtain if there be a similar provision in the state constitution.

Counsel for appellees would concede that if the bill in the present case, in addition to the averments of fact now contained therein, had alleged also the legal conclusion that the enforcement of the provisions of the concurrent resolution would violate the provision of the Federal Constitution prohibiting a state from enacting a law impairing the obligation of a contract, then the jurisdiction of the Federal Court would clearly obtain. But, as the authorities cited in our former brief clearly establish, this allegation of a mere legal conclusion would be surplusage, and cannot have any effect on the question of jurisdiction. It would seem to be beyond doubt that if the allegations of our bill would be sufficient to establish Federal jurisdiction in case we had included therein this statement of a legal conclusion, then the allegations of our bill just as certainly present an issue conferring Federal jurisdiction without the statement of this legal conclusion.

As was said by Judge Marshall in *Ozark Bell Telephone Co. vs. City of Springfield*, 140 Federal Rep., 669, "the bare averment that the ordinance contravenes the Constitution of Missouri states no issuable fact. It is mere legal conclusion," and the Court there holds that (p. 666)—

— "A bill by a telephone company to enjoin the enforcement of a city ordinance fixing maximum rates of charge for telephone service, which alleges that the

ordinance was passed in the exercise of power to fix rates conferred upon the city by an act of the Legislature, and that if enforced complainant cannot make any net earnings whatever on its large capital invested in the business, nor sufficient to pay its necessary expenses, and will be deprived of its property without due process of law, states a cause of action arising under the fourteenth amendment to the Constitution of the United States, of which a Federal Court has jurisdiction, *although it is further averred, as a legal conclusion, that the ordinance is also in violation of the state constitution, prohibiting the impairment of the freedom of contract.*" (Syl.)

In *Des Moines City Railway Company vs. City of Des Moines*, 151 Federal Rep., 860, it is said:

"Finally, it is urged by counsel for the city that the case can be decided under the Iowa Constitution, and therefore there is no Federal question. That is the rule as to taking a writ of error to the Supreme Court, but *it is not the test as to jurisdiction of this court*. The contention of the city is because of article 1, section 21 of the Iowa constitution: 'No law impairing the obligation of a contract shall ever be passed,' and those other provisions much like recitals to be found in the fourteenth amendment. Thirty-two of the states have a similar provision, and yet time and again from those states have cases arisen and been carried through the Supreme Court without a diversity of citizenship, on Federal questions from states wherein were involved the contract clause, and of taking property without due process of law. It must never be forgotten that the Constitution of the United States according to its own recitals in article 6 is as follows: 'This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land.' And when it is not so this government will be at an

end, and we will again have a confederation. In most cases wherein the United States Circuit Courts take jurisdiction, such courts and the state courts have concurrent jurisdiction. But if the contention of defendant's counsel is correct, then in 32 states of this Union United States Courts are ousted of jurisdiction by the action of those states, while in the remaining states the jurisdiction remains."

And in *San Francisco Gas & Electric Light Company vs. City of San Francisco*, 189 Federal Rep., 943, the court announces its decision in similar language:

"A suit by a gas company to enjoin enforcement of a municipal ordinance fixing the price of gas, passed in the exercise of powers conferred by the state constitution, as being confiscatory and depriving complainant of its property without due process of law in violation of the fourteenth constitutional amendment, presents a Federal question under such provision which gives a Federal court jurisdiction, *notwithstanding the fact that the state constitution contains a like provision, and on the facts alleged in the bill the ordinance would be invalid thereunder.*" (Syl.)

Our position is well sustained in *Hall vs. Chicago R. I. & P. Ry. Co.*, 149 Fed., 564:

"The petition alleges that defendant is a corporation duly organized under the laws of Iowa and Illinois, and is a common carrier engaged in operating a line of railroad from Chicago, in the state of Illinois, westward into and through the state of Iowa; that on December 13, 1905, said Edward W. Griffiths, Jr., was in the employ of defendant upon one of its trains in Iowa, and on that day while in the discharge of his duty in uncoupling the air hose and cars of said train was seriously and permanently injured by rea-

son of defects in the road bed and the appliances upon the car arising from defendant's neglect and the negligence of the other employees of the train in moving the same.

"The claimed right to remove this cause from the state court rests solely upon the ground that the action is one arising under a law of the United States, viz.: the Act of Congress, approved June 11, 1906, commonly known as the 'Employers' Liability Act.' * * *

"It is the contention of the plaintiff that the cause of action does not arise under this Act of Congress, or at least that it does not so appear from the allegations of his petition. It is undoubtedly true that under the Act of March 3, 1887, c. 373, 24 Stat., 552, and Act August 13, 1888, c. 866, 25 Stat., 433 * * * a case not depending on diversity of citizenship cannot be removed from a state court into the Circuit Court of the United States, unless that fact appears by the plaintiff's own statement of his cause of action; and if it does not so appear the fact cannot be supplied by the petition for removal (citing authorities).

"But the court takes notice of the laws of Congress and if the facts stated by plaintiff as the basis of his right of recovery show a right of action given or created by such a law, then it may fairly be said that it appears from his own statement of his claim that the action is one arising under a law of the United States. If the same facts show, also, a right of action created or given by a state law, still it would be for the court to determine under which statute the action was maintainable, if at all; and if one construction of the Federal statute would sustain, and another construction would defeat, a recovery under that statute, the action would be one arising under a law of the United States, and therefore of Federal cognizance. *Starin vs. United States*, 115 U. S., 248-257; *Carson vs. Dunham*, 121 U. S., 421-427. It sufficiently appears, therefore, from plaintiff's petition that the cause of action as alleged therein is one arising under a law of the United States, if the act of Congress of July 11, 1906, is to be given a retroactive effect."

The contention of appellees, in whatever fashion presented, amounts to merely this: that while, under the allegations of the bill, a cause is presented which necessitates the determination by the court of the question whether the complainant had a subsisting contract under the terms of the granting ordinance of 1884, and if so, whether the enforcement of the concurrent resolution of 1908 would impair the obligations of that contract, nevertheless, the cause does not arise under the Constitution of the United States because the bill does not in terms explicitly allege the legal conclusion that the threatened violation of appellant's contract would constitute a violation of the provision of the Federal Constitution prohibiting a state from passing a law impairing the obligation of a contract. Such a contention under the repeated adjudications of this court and under elementary principles of pleading is untenable.

Respectfully submitted,

EDGAR H. SCOTT,
Counsel for Appellant.

LODOWICK F. CROFOOT,
Of Counsel.

(22,378.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 757.

OMAHA ELECTRIC LIGHT AND POWER COMPANY,
APPELLANT,

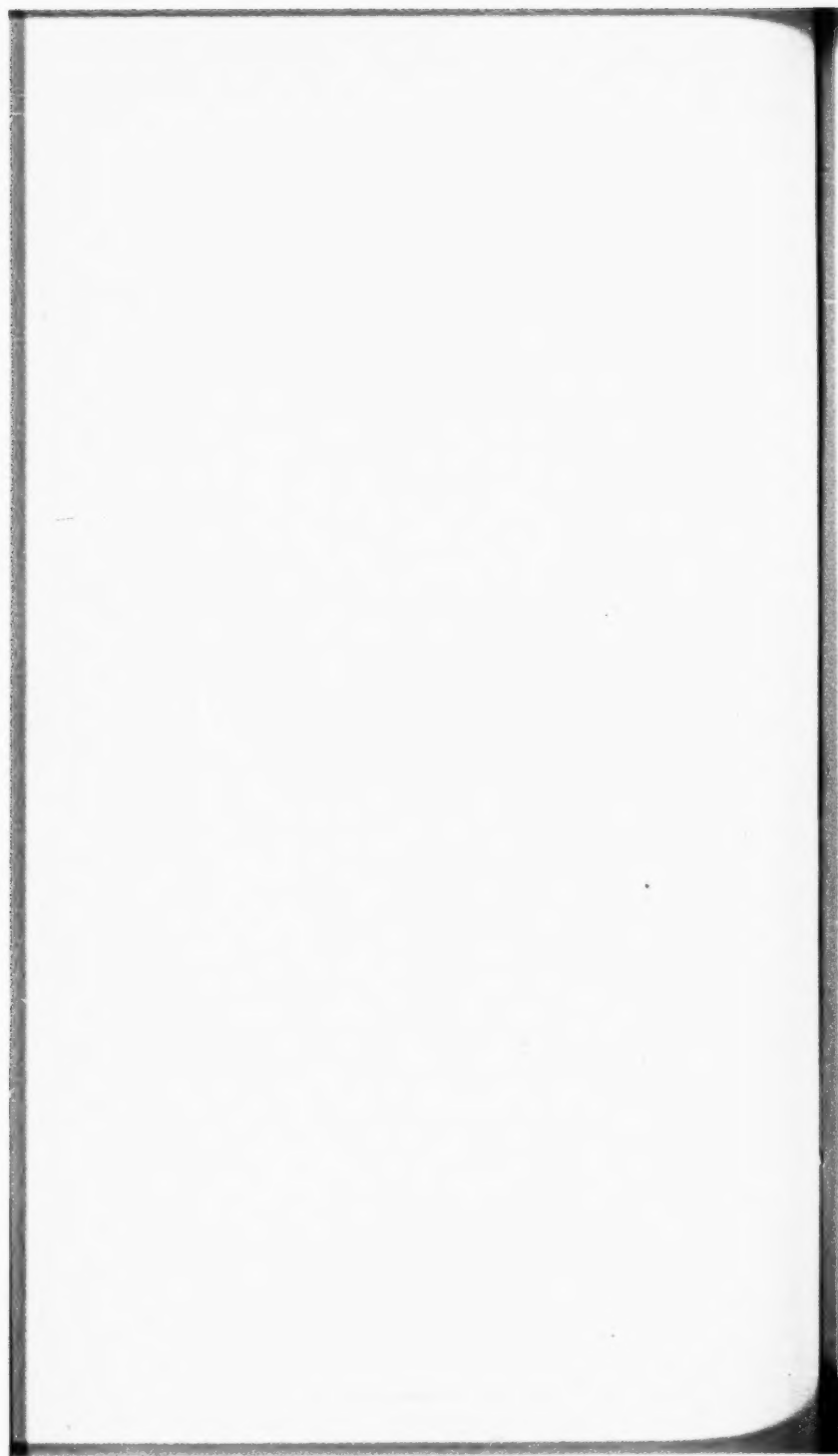
vs.

THE CITY OF OMAHA AND WALDEMAR MICHAELSON.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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EXTRACTS FROM TRANSCRIPT OF RECORD.

* * * * *

(Record, page 1.)

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

——— In Equity.

OMAHA ELECTRIC LIGHT AND POWER CO.

vs.

THE CITY OF OMAHA and WALDEMAR MICHAELSON.

Doc. "Y", Page 105.

The Bill of Complaint of Omaha Electric Light and Power Company.

To the Judges of said Court:

The Omaha Electric Light and Power Company brings this suit in equity against The City of Omaha and Waldemar Michaelson and for its cause of action says:

(1) The plaintiff, Omaha Electric Light and Power Company, is a corporation created by and organized under the laws of the State of Maine, and is a citizen of said State of Maine.

(2) The defendant, The City of Omaha, is a municipal corporation created by and organized under the general laws of the State of Nebraska, and is a citizen of said State of Nebraska, and the defendant, Waldemar Michaelson, is an officer of said municipal corporation, whose official title is City Electrician, and he is a resident and citizen of said State of Nebraska.

(3) This suit is a controversy between citizens of different states, and the matter in dispute in said controversy exceeds, exclusive of interest and costs, the sum or value of Two Thousand (2000) dollars.

During the year 1884, the defendant, The City of Omaha, having full power therefor by and under the general laws of the State of Nebraska, did, by ordinance, grant to New Omaha-Thompson-Houston Electric Light Company and its assigns, the privilege, license and franchise for the erection and maintenance of poles and wires, with all needful appurtenances thereto, upon and over the streets, alleys and public grounds of the said City, under such regulations as should be thereafter provided by ordinance of said City, which said granting ordinance is in words and figures as follows, to wit:

"Ordinance No. 826.

An Ordinance Granting the Right of Way to the New Omaha-Thompson-Houston Electric Light Company and Regulating the Same, and Prescribing Penalties for the Violation of This Ordinance.

Be it Ordained by the City Council of the City of Omaha:

SECTION 1. That the New Omaha-Thompson-Houston Electric Light Company, or assigns, is hereby granted the right of way for erection and maintenance of poles and wires, with all the appurtenances thereto, for the purpose of transacting general electric light business through, upon and over the streets, alleys and public grounds of the City of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance. Provided, that said Company shall at all times, when so requested by the city authorities, permit their poles and fixtures to be used for the purpose of placing and maintaining thereon any wires that may be necessary for the use of the fire department or police of the city; and, Provided Further, such poles and wires shall be erected so as not to interfere with the ordinary travel through such streets and alleys; and Provided, that whenever it shall be necessary for any person to move along or across any of said streets or alleys any vehicle or structure of such height or size as to interfere with any of the wires so erected the company operating such poles and wires shall, upon receiving twelve (12) hours' notice thereof temporarily remove said poles and wires from such place as must necessarily be crossed by such vehicle or structure; and Provided Further, that whenever the City Council shall, by ordinance, declare the necessity of removing from the public streets and alleys of the City of Omaha the telegraph, telephone or electric poles or wires thereon constructed or existing said company shall, within sixty (60) days from the passage of such ordinance remove all poles and wires from such streets and alleys by it constructed, used or operated.

SECTION 2. Any person who shall interfere, cut, injure, remove, break or destroy any of the poles, wires, fixtures, instruments or other property of the New Omaha-Thompson-Houston Electric Light Company, or assigns, within the corporate limits of this city, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not exceeding One Hundred Dollars.

SECTION 3. This ordinance shall take effect and be in force from and after its passage."

(5) New Omaha-Thompson-Houston Electric Light Company was a corporation organized under the laws of the State of Nebraska, for the purpose, among other things, of constructing and maintaining lines of wire conductors suspended upon poles and cross-arms for the transmission of electric current from central or generating stations to points of consumption, and for the production of light for the illumination of public streets and private buildings.

Said New Omaha-Thompson-Houston Electric Light Company accepted the grant from the defendant city and the terms thereof and thereafter, beginning in the year 1885, expended a large sum of money, to wit: more than the sum of \$1,500,000.00 Dollars in the erection of a plant and acquisition of machinery for the generation of electric current and a system of pole lines and wire conductors and all necessary superstructures in the streets and alleys of said city for the transmission of such electric currents throughout the city for the lighting of public streets and sale and distribution of the same to consumers, and which said system has, during all of the time since, been maintained, used and operated through and in the streets of said city by means of such poles and superstructures, or by means of sub-ways constructed under the surface of such streets and alleys; that the said New Omaha-Thompson-Houston Electric Light Company and this plaintiff, as its successor, has been, during all of said period, actually engaged in furnishing to private or individual consumers electric current by means of the said plant, and have, during all of said period, been the only person or corporation engaged generally in said business, or having any authority to occupy the streets and alleys of said city therefor.

(6) In the year 1902, the defendant, The City of Omaha, passed an ordinance entitled "An ordinance requiring all electric and other wires, when used for electric lighting, heat, power and other commercial purposes, excepting those used for propelling street cars and telegraph and telephone wires, to be placed under ground in a part of the City of Omaha," whereby it was ordained, among other things, that all persons or companies owning, maintaining or operating electric or other wires in said city, for the transmission of electricity for light, heat and power should, on or before the first day of October, 1905, place all such wires, in a district defined by said ordinance, underground, and that after said date no person or company should be permitted to maintain any such wires within the district defined, without first complying with said ordinance, excepting such feeder and trolley wires as were used for propelling street cars and telephone and telegraph wires, and providing a penalty for maintaining any wires overhead in said district in violation of said ordinance; that said ordinance was designed as a police regulation compelling New Omaha-Thompson-Houston Electric Light Company to construct sub-ways and place its wires underground in the district defined by the ordinance and in the extensions of said district. A copy of said subway ordinance is hereto attached and made part hereof and marked Exhibit "A."

(7). Afterwards the life of New Omaha-Thompson-Houston Electric Light Company was about to expire by limitation of time and this plaintiff was organized to become its successor and to take over its property, rights and privileges, and thereupon, to-wit: July 29, 1903, said New Omaha-Thompson-Houston Electric Light Company sold, assigned and transferred to this plaintiff all of its property, rights and franchises (excepting its corporate franchise), including the right, license and franchise to occupy the streets and alleys of said city granted to said New Omaha-Thompson-Houston

Electric Light Company by the ordinance of 1884, as hereinbefore alleged, and the said New Omaha-Thompson-Houston Electric Light Company, prior to said assignment, and this plaintiff, afterwards, fully complied with the requirements of said police regulation and expended a large sum of money, aggregating, to-wit: more than the sum of 400,000 dollars in the construction of subways and in placing such wire conductors in cables underground, within the district defined by said ordinance.

(8) Plaintiff further avers that in the year 1884, and for some time thereafter the use of electric currents for producing power and heat had not been extensively developed; that electric currents adequate for the production of street and inside lighting are required to be of high potentiality and at the time of granting the franchise by the defendant city, as aforesaid, it was, and all of the time since it has been, the universal custom of all companies engaged in generating and distributing such electric currents for use in the production of street and inside lighting to supply consumers with such quantity of current as was or may be demanded for such use as such consumers may see fit to make of the same; that the universal method of companies engaged in generating and distributing electric current for the production of light was at the time of granting said franchise, and ever since has been, except in public street lighting, to sell and transmit the current by means of wire conductors to the premises of the consumer, to be used by him, not for any specific or restricted purpose, but for all purposes for which he desired or may desire to use the same; that the specific use of such currents has never been either dictated by or under the control of such companies; that such currents have always been converted into light by the consumer himself, upon his own premises, by means of a switch or key, the manipulation of which permits the current to flow through a lamp which, by interposing resistance, produces light and which apparatus is under the control of the consumer; that the business, so far as it is controlled and conducted by the company generating and distributing the necessary and adequate electric currents, consists in merely supplying such current to the consumer and upon the consumer's premises, ready for conversion to his use; that the conversion of such current into, or the use of the same for the production of power or heat, is and has always been done by the consumer himself, upon his own premises, by means of a switch or key manipulated and operated, upon the same principle as in the production of light, by the consumer himself, and which permits the current to flow through a motor or heating device which is also under the control of, and operated and owned by the consumer; that in the conversion of such currents into power and heat the apparatus by which the consumer converts the current into light is often removed temporarily, and the appropriate apparatus for producing power or heat, according to the requirements of the consumer is connected by him with the identical supply conductor from which he takes the current for conversion into light, without any action whatever on the part of the company who supplies the current, the use of the respective apparatuses being interchangeable as the convenience of the con-

sumer may require; that when the business of the consumer requires the use of the current for light and power, or heat, at the same time, the different apparatuses are connected by different conductors, so that identically the same current delivered to the premises of the consumer by means of the same conductor is divided and distributed by the consumer upon his own premises and converted to such use as he desires; that in a great majority of cases the current which is converted into power or heat is taken from the same conductor which simultaneously supplies current for conversion into light, such current being merely divided by means of connecting conductors which distribute the same; that for the supply of consumers who require a large number of power units the plaintiff maintains in said city five exclusive conductors suspended upon the same pole lines or drawn into the same conduits with its other circuits; but in such cases the conversion of the current into power is done by the consumer upon his own premises, by the means aforesaid; that no different use whatever is, or has ever been, made of the streets and alleys of the city, whether the current be employed by the consumer for the production of light, power or heat, and the sale of electric current, by plaintiff, which consumers convert into power or heat, is merely the disposition of surplus product of plaintiff's generating system, exceeding that required by the public for producing light, but which is of great public utility and convenience when applied to manufacturing, business and domestic uses; that the New Omaha-Thompson-Houston Electric Light Company did, during all of the time prior to the transfer to the plaintiff as aforesaid, transmit, and this plaintiff has, during all of the time since, transmitted, electric current in the manner herein alleged to numerous and continuously increasing number of consumers who converted such electric current into power or heat as such consumers desired and in the manner and by the devices herein alleged and all with the knowledge and acquiescence of the defendant city.

(9) The defendant city has continuously, since 1884, by ordinances passed at various times, and intended to apply to the plaintiff and its predecessor, New Omaha-Thompson-Houston Electric Light Company, and to consumers supplied with electric current by each, regulated the installation of conductors and appliances for the transmission and use of such currents for power and heat, all of which said regulations have been complied with by New Omaha-Thompson-Houston Electric Light Company and by this plaintiff. That is to say, that said defendant city has passed ordinances prohibiting all persons from using electric currents for power or heat or from installing new or repairing old apparatus therefor, without first filing plans and specifications for the same in the office of the City Electrician and obtaining a permit for such installation and use, describing the plan of construction, material, apparatus and proposed use; and ordinances empowering and requiring the City Electrician to make inspection of such installations and repairs before and after the same were made and requiring the same to conform to the regulations of the city and the requirements of such City Electrician in the interest of safety; and ordinances requiring said City Elec-

trician to re-inspect all such installations and apparatus at least once each year and to require the persons owning or using the same to conform to the regulations and requirements of said City Electrician in the interest of safety; requiring the payment of fees for permits, for motors, to wit: "one-horse power or less, \$1.00, excess at 50 cents; ten-horse power, \$5.50, excess at 25 cents; no charge for any motor installation to exceed \$10.00," and ordinances requiring the payment of fees for inspection and for permits granted for installation of conductors and apparatus for the conversion of electricity into heat and power; and ordinances requiring all persons and corporations engaged in commercial lighting and power transmission to furnish the City Electrician, on the first day of each month, a report showing each motor installation connected to their system during the month and each such motor installation discontinued during the month; and ordinances requiring all persons doing wiring for motors and for light, heat and power to obtain a permit and pay a license fee of \$5.00 therefor, upon examination and proof of qualification; and ordinances requiring all drop wires designed to carry power current to be heavily insulated; and ordinances prohibiting electric light and power wires being attached to the same cross arm and not to be suspended upon the same pole line with conductors of low potential currents like telephone and telegraph wires, and requiring all wires designed to carry an electric light or power current to be covered with substantial high-grade insulation and all connections with electric light or power conductors to be made at right angles, and pursuant to said regulations the defendants have made inspection of hundreds of installations for the use of electric current for power and heat by consumers to whom New Omaha-Thompson-Houston Electric Light Company and this plaintiff supplies the current pursuant to the franchise aforesaid and the said defendant city has issued hundreds of permits for such installations and has received the established fees therefor from such consumers and from electricians employed by them and from this plaintiff and its said predecessor, all with full knowledge of the facts herein alleged and with full knowledge that New Omaha-Thompson-Houston Electric Light Company and this defendant were relying upon the grant of said franchise and intending thereunder to furnish the electric current to such consumers.

(10) Prior to the transfer of its property and franchise to plaintiff as hereinbefore alleged the New Omaha-Thompson-Houston Electric Light Company supplied the City of Omaha with street lights by contract and by said contract agreed to pay to the defendant city annually, a sum equal to three (3) per cent of its gross receipts from lighting and power business done within the city of Omaha, excepting such gross receipts as were derived from the said city for such street lighting, and at the expiration of said contract this plaintiff entered into a similar contract with said city, which said contract is still in force and a copy of same is hereto attached and made part hereof and marked Exhibit "B", whereby plaintiff agreed to pay to said city a sum equal to three (3) per cent of its gross receipts from lighting and power business done within the city and pursuant

to said contract said New Omaha-Thompson-Houston Company and this plaintiff have paid to the defendant city in the aggregate the sum of 12,619.00 dollars for gross receipts from the sale of electric current to consumers for the production of power alone, and plaintiff says that, continuously since the granting of said franchise, the defendant city and said New Omaha-Thompson-Houston Electric Light Company and this plaintiff have, by practical and almost daily actual application of the same, construed the said franchise, license or privilege, granted as aforesaid, as a right to occupy the streets and alleys with the proper appliances for the transmission of electric current for sale to consumers without any restriction whatever upon the plaintiff as to the use to be made of such current by such consumers, the said defendant city having full power to restrict the consumers to lawful uses and safe methods of use; that since the granting of said franchise the use of electricity for the production of power and heat has been greatly developed by invention of new and improved devices, so that the same has come to be very extensively employed by the public for domestic, business and manufacturing purposes; that many important businesses have been equipped at great expense, by the owners, for the use of electric current in the production of power and have become dependent upon such service, such as the grain business operating grain elevators and all kinds of business requiring freight or passenger elevators in buildings, manufacturing business requiring power for the operation of machinery, and a large part of the current generated and distributed to consumers by plaintiff is employed by said consumers for the production of power and heat; that this plaintiff has, relying upon the interpretation continuously given to said franchise as hereinbefore alleged, expended large sums of money, in the acquisition of said plant and franchise from New Omaha-Thompson-Houston Electric Light Company and in the extension and equipment of the same with the newest, most modern and most economical devices and machinery for generating the electric current for supplying the demand of the public, so that plaintiff has now an investment within the City of Omaha of more than 2,500,000 Dollars and its gross annual income from the sale of electric current in Omaha, which is employed by consumers in the production of power, exceeds, 116,000 Dollars, and is equal to about one-fourth of its gross income from business within the City of Omaha.

11. The capacity of plaintiff's generating plant and machinery has been developed, improved and enlarged from time to time to meet the increasing necessities and demand of the public for electric current, due to the increased use of electricity caused by new discoveries and inventions, and to the general growth and development of the City of Omaha, and to enable plaintiff to produce such current at the lowest cost to the consumers. To a very large extent the current consumed for producing power and heat is demanded during the day time when the consumption for light is least and the current consumed for producing light is, to a great extent, demanded during the night time when the demand for power and heat is least, and by keeping its plant and system in continuous operation and as

nearly as possible to its full producing capacity, plaintiff is able to serve the public at lowest cost and to its own advantage, and plaintiff's whole system has been developed and built up in reliance upon the interpretation of its franchise right as hereinbefore set forth.

12. Until about the 26th day of May, 1908, the defendant city had not questioned the right of plaintiff under the granting ordinance aforesaid to generate and transmit electric current to consumers through, upon, over, and under any of the streets and alleys of said city by means of its pole lines and wire conductors and its conduits and wire conductors therein, or that such consumers had no right to employ electric current so generated and transmitted by plaintiff for the production of power or heat, or that the plaintiff had no right to generate and transmit such electric current to any such consumer who would or who intended to use the same for the production of power or heat. But now the defendant city claims and gives out that this plaintiff has no right, under the said franchise, to transmit or deliver to any consumer any electric current which the said consumer may intend to use by converting the same into power or heat and on said 26th day of May, 1908, the defendant city, by its Mayor and Council, passed the following concurrent resolution and caused a copy thereof in writing to be served upon plaintiff, to-wit:—

"Concurrent Resolution No. 2330.

Resolved, by the City Council of the City of Omaha, the Mayor concurring, that the City Electrician be and he is hereby ordered and directed to disconnect, or cause to be disconnected, on or before July 1st, 1908, all wires leading from the conduits or poles of the Omaha Electric Light and Power Company transmitting electricity to private persons or premises to be used for heat or power; and to take such steps as may be necessary to prevent the said Omaha Electric Light and Power Company from furnishing or transmitting from the conduits or wires electricity to private persons or premises for heat or power purposes; and be it further resolved, by the City Council of the City of Omaha, the Mayor concurring, that the Electrician be, and he is hereby ordered and directed to remove or cause to be removed on or before July 1st, 1908, all conduits, wires and poles belonging to the Omaha and Council Bluffs Street Railway Company and located in, under, upon or over, any street, alley, thoroughfare, or public place of the City of Omaha and maintained and used by said Street Railway Company for furnishing or transmitting electricity to private parties or premises for light, heat or power purposes.

Introduced by Councilman M. F. Funkhauser.
Passed May 26th, 1908.

Attest:

DAN B. BUTLER, *City Clerk.*

Approved:

JAMES C. DAHLMAN, *Mayor.*
L. B. JOHNSON,
Pres. of Council."

And on the 16th day of June, 1908, the defendant Waldemar Michaelson, City Electrician of said City, served notice in writing on plaintiff, in words and figures as follows, to-wit:—

“City of Omaha Electrical Department, Waldemar Michaelson, City Electrician.

OMAHA, NEBR., *June 16, 1908.*

Omaha Electric Light & Power Company, Omaha, Nebr.

GENTLEMEN: In accordance with Concurrent Resolution #2330, passed by the Council May 26-08, and approved by His Honor, the Mayor, June 1-08, you are hereby notified that unless you disconnect or cause to be disconnected before July 1-08, all wires leading from conduit or poles of your Company transmitting electricity to private persons or premises to be used for heat or power, it will, on the date above mentioned, become my duty to cause the disconnection of said wires.

Respectfully yours,

WALDEMAR MICHAELSON,
City Electrician.”

And the said Michaelson, has since notified plaintiff, orally, that he will, on the first day of July, 1908, unless plaintiff then ceases to transmit electric current to consumers who employ the same for the production of power or heat, or for any other purpose than the production of light, he will, with the assistance and authority of the police force of said city, execute the concurrent resolution aforesaid, and will, by force, sever the connection of plaintiff's wire conductors so as to prevent the transmission of electric current to such consumers, and continuously, by force, prohibit and prevent the restoration of the same. Plaintiff says as it is the fixed purpose of the said Waldemar Michaelson to carry out the instructions embodied in the joint resolution of the Mayor and Council aforesaid, and it is the intention and purpose of the defendant city to have the same carried out and enforced and for that purpose the defendant city will afford the said defendant Michaelson the protection and assistance of the police force of said city and unless restrained by the process of this court the said defendant Michaelson will execute the said resolution and that such forcible interference with plaintiff's said business will stop the transmission of electric current to plaintiff's patrons within the City of Omaha and to a large number of patrons outside of said City, in South Omaha, Council Bluffs and elsewhere and will prevent the said patrons from carrying on their usual and lawful business and produce enormous losses to them and to the public; that such interference will produce great and irreparable loss and damage to this plaintiff, the amount of which loss and damage, in money, it will be impossible to ascertain and determine so that the plaintiff may be adequately compensated therefor; and that plaintiff has no adequate remedy at law for the wrongs and lawless acts threatened and now

about to be committed by the authority and in the name of the defendant city and under color of official power.

Wherefore, as plaintiff can have no adequate relief, except in this court, and to the end, therefore, that the defendants The City of Omaha and Waldemar Michaelson, may, if they can, show why plaintiff is not entitled to receive the relief herein prayed for, and that the said defendants may make full, true, perfect and direct answer hereto and thereby truthfully disclose and make discovery of all the matters hereinbefore alleged, all according to the best and utmost of their knowledge, information and belief (but not under oath, an answer under oath being hereby expressly waived), and that the said defendants, The City of Omaha, its officers and representatives, and the defendant Waldemar Michaelson, and his successors in office may be, by the process and decree of this court perpetually enjoined and restrained from cutting, removing or otherwise severing or disconnecting the wire conductors, or any wire conductor, or in any manner whatever interfering with such conductors or any other structure, apparatus or device belonging to plaintiff so as to stop or impede the plaintiff in its business of transmitting electric current to and for the use of any person or persons who have contracted, or who may hereafter contract, for such service to be rendered and performed by plaintiff, and that plaintiff may be thereby completely protected, against the threatened interference with its property and rights, plaintiff prays that Your Honors may grant a writ of injunction to be issued out of and under the seal of this court enjoining and restraining the said defendants, *pendente lite* as aforesaid, and that, by final decree, the said injunction be made perpetual.

And plaintiff further prays that upon rendering final decree Your Honors will, in addition to the taxable costs herein, assess adequate damages against defendants and in favor of plaintiff, including not only all reasonable expense incurred by the plaintiff in the prosecution of this suit, most unjustly caused by the defendants, but any and all other damages which plaintiff may then have sustained.

And plaintiff further prays that a restraining order be issued by the court restraining the said defendants as aforesaid, pending the hearing of the application to the court for an injunction *pendente lite* and for such other and further relief as Your Honors may find to be due to plaintiff, and

May it please you- Honors to grant plaintiff, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said defendants, The City of Omaha and Waldemar Michaelson, commanding them and each of them, on a day certain, to appear and answer this Bill of Complaint and to abide and perform such order and decree as to the court shall seem proper and be required by the principles of equity and good conscience.

WESTEL W. MORSMAN,
Solicitor and Counsel for Plaintiff.

UNITED STATES OF AMERICA.

State of Nebraska, County of Douglass, ss:

I, Frederick A. Nash, on my oath do say that I am president of Omaha Electric Light and Power Company, the plaintiff named in the foregoing Bill of Complaint; that I am familiar with the plaintiff's business and with the facts alleged and set forth in the foregoing Bill of Complaint, which I have read, and the facts therein set forth are true, so help me God.

FREDERICK A. NASH.

Subscribed and sworn to by Frederick A. Nash, before me, the 29th day of June, A. D. 1908.

[SEAL.]

MABEL C. HIGGINS,
Notary Public.

EXHIBIT "A".

Ordinance No. 5051.

An ordinance requiring all electric and other wires, when used for electric light, heat, power and other commercial purposes, excepting those used for propelling street cars, and telegraph and telephone wires, to be placed underground in a portion of the City of Omaha.

Be it Ordained by the City Council of the City of Omaha.

SECTION 1. That all persons and companies owning, maintaining or operating electric wires or other wires in the City of Omaha, and in the district hereinafter defined, for the transmission of electricity for light, heat and power, shall, on or before the first day of October, 1905, place underground all such wires, and after said date, no persons or companies shall be permitted to maintain in said district in any streets, alleys, or public grounds of said City any electric or other wires, without first complying with the provisions of this ordinance, excepting however, such feeder and trolley wires as may be used for propelling street cars and telegraph and telephone wires.

SECTION 2. The district mentioned in section one (1) of this ordinance, shall be that portion of the City bounded on the east by Eighth Street, on the west by Eighteenth street, on the south by Howard street, and on the north by Capitol Avenue, but nothing herein contained shall be construed to prevent the enlargement of such district from time to time as the growth of the City may require.

SECTION 3. For the purpose of complying with the requirements of this ordinance all persons or companies shall, on or before the expiration of the time aforesaid, construct in the streets and alleys of the City within said district, under-ground conduits with all necessary appliances and devices to make the work modern, safe and efficient; all such construction shall be located in alleys when possible, in preference to streets, and shall be located under the supervision of the City Electrician.

SECTION 4. Distributing poles for wires may be placed in the alleys between streets, providing no such pole or poles are placed within fifty feet of the curb line of said streets and in no case will overhead wires from such poles be allowed to cross the streets; For street arc lights and lighting street intersections laterals may be run from the main subway.

SECTION 5. Before construction of any of the work hereby required, the said persons or companies shall file with the board of public works a plan and map and all necessary details of the work with specification showing the material to be used and the method of construction to be employed all of which shall be subject to the inspection of the City Electrician; and no such construction shall be commenced until the plans and specifications shall have been approved by the Board of Public Works and all such construction shall be carried on under the direction of the Board of Public Works.

SECTION 6. All persons or companies constructing such subways shall as fast as the construction of such subway or conduit progresses, promptly fill all openings in the streets and alleys and relay all curbing, paving and guttering, which may necessarily be removed in the construction of the work, and shall pay all damages for personal and other injuries that may occur, either to private individuals or corporations as well as to the City of Omaha, resulting from or growing out of the negligence or (or) want of care of said persons or companies in the construction of any of the work herein required.

SECTION 7. The location of the underground work herein provided for shall not interfere with sewers constructed or in progress of construction with gas or water pipes already laid or with the underground work of any telephone company, and must be located and constructed without unnecessary injury or inconvenience to the public.

SECTION 8. All the provisions of this ordinance shall be applicable to any other district hereafter created or to any part of the City which by extension of the district herein defined shall be included therein.

SECTION 9. Any person or companies who shall maintain any electric wires, or other wires, in the streets or alleys of the City of Omaha in violation of this ordinance shall on conviction be punished by a fine not exceeding \$100.00 and all such electric wires or other wires may be removed by the City Electrician after thirty days' notice in writing.

SECTION 10. This ordinance shall take effect and be in force from and after its passage.

EXHIBIT "B".

City Contract.

(Omaha).

This agreement made and entered into this 12th day of April, A. D. 1905, by and between the Omaha Electric Light and Power Company, hereinafter called the Company, and the City of Omaha, hereinafter called the City.

"Witnesseth, That for and in consideration of the covenants and agreements hereinafter contained, and under penalty of a bond for \$10,000 to be given by the Company on demand, the Company does hereby agree with the City to light the streets, alleys, and public grounds and buildings of the City of Omaha, in accordance with the following terms and conditions, to-wit:

There being an agreement now in force by and between the parties hereto, covering the lighting of the streets, alleys and public grounds of the City of Omaha, for a term of years, which term will expire on the 31st day of December, A. D. 1905, which term both parties desire to extend, it is now agreed by and between the parties hereto, that the said term of lighting shall be extended, under and by virtue of this agreement, for a period of four years from the 31st day of December, A. D. 1905, and until the 31st day of December, A. D. 1909, during which term all electric lamps and lights required by the City for lighting the streets, alleys, public grounds and public buildings in the City of Omaha shall be furnished by the Company.

In Consideration of the extension of the term of said contract, the Company hereby agrees to reduce the price of all arc lamps herein provided for, to the sum of Seventy-five (75.00) Dollars per light per year, commencing on the date this contract shall take effect and be in force.

It is mutually agreed that the Company shall at all times furnish, and the City shall use and pay for, not less than Six Hundred arc lights, in accordance with the terms of this agreement.

For operating at normal candle power, each arc light shall be supplied constantly, when in use, with six and six-tenths (6.6) amperes of current at a difference of potential of not less than seventy (70) volts measured at the terminals of the lamp, or the equivalent in watts; either direct or alternating current lights may be used at the option of the Company.

To enable tests of the amount of electrical energy being furnished to be made by the City Electrician, the Company hereby agrees to run one of its municipal circuits into the office of the City Electrician (in one of its municipal circuits into the office of the City Electrician) in the city building, and to maintain the same during the period covered by this contract, and allow the City Electrician, at such times as he may desire, to test the same as to the amount of electrical energy supplied. The Company further agrees to permit the City Electrician, or the proper officers representing the City, to

enter its power house at any reasonable hour, for the purpose of measuring the amount of electrical energy that is being furnished on all streets or lighting circuits, or for the purpose of making other tests that are reasonably necessary under the operation of this contract. All arc lights shall be lighted by the Company every night during the said term at twilight, and kept continually lighted until daylight, and they shall be kept in order by, and at the expense of the Company.

All arc lights shall be located at the places designated by the Mayor and Council, except that it is mutually agreed no arc lights shall be placed at such a place (without the consent of the Company) that in order to reach said place, an extension of the circuits of the Company of more than One Thousand (1000) feet shall be required.

After an arc light has been located and erected in place, it shall be moved upon request of the City, but the cost of such removal to another location shall be borne by the City.

The Company further agrees that in placing said arc lights in position, in digging and excavating, in streets, in erecting poles and wires, in making repairs, and in laying underground conduits or in doing any other act required by any ordinance of the City, and in the use or maintaining of its structures, and plant, it will carefully observe and indemnify and save the City harmless against all suits and actions brought against it for any injuries or damages sustained by any person or persons, by reason of the maintaining of said electric lines, wires or poles, or other structures or parts of the Company's plant, which shall be due to the negligence of the Company or by reason of the failure of the Company to do or perform any of the said acts or things.

Therefore, in consideration of the faithful compliance with the terms and conditions herein contained, the City of Omaha hereby agrees to pay to the Company at the rate of Seventy-five Dollars (\$75.00) per annum, for each of said arc lights so furnished and used, and for every failure or neglect to light any of said arc lights, or when said arc lights are lighted they shall consume less electrical energy than the quantity hereinbefore mentioned, the Company shall rebate to the City the proportion of the rates above mentioned, for the consumption of electrical energy, which amount may be deducted from the sum owing to said Company under this contract. The Company agrees to furnish electric lights for the City Hall, and any other public buildings belonging to the City, and the City hereby agrees to pay for all incandescent lights that may be used by the City at the rate of eight (8) cents per one thousand (1000) watts of all current consumed.

All sums due and payable to the Company by virtue of this agreement shall be paid monthly by the City to the Company at the expiration of each month.

And in further consideration of the terms hereby agreed upon, the Company hereby agrees to pay, during the term, to the City a sum equal to three (3) per cent of its gross receipts from lighting and power business done within the City, not including any revenue derived from the said City, said payments to be made annually, on

or before the 10th day of January in each year during the term, and any renewal or extension that may hereafter be made of the same.

It is mutually agreed by the parties that, if, at any time after December 31st, A. D. 1908, the City shall acquire a plant of its own, for street lighting, by electricity, then, and in that event, the City may, at its option, at once determine this contract, and on notice therefor all further rights and obligations thereunder shall at once cease and determine.

In Witness Whereof, the said parties have caused these presents to be duly executed and attested, and their respective seals to be attached the date first above written.

(Signed)

OMAHA ELECTRIC LIGHT
AND POWER CO.,

By F. A. NASH, *President.*

[SEAL.]

Attest:

S. E. SCHWEITZER,
Secretary.

THE CITY OF OMAHA,

[SEAL.]

By H. B. ZIMMAN, *Acting Mayor.*

Attest:

W. H. ELBOURN,
City Clerk.

Endorsed: Filed June 29, 1908. Geo. H. Thummel, Clerk.

* * * * *

(Record, page 121.)

In the Circuit Court of the United States for the District of
Nebraska.

Y-105.

OMAHA ELECTRIC LIGHT & POWER COMPANY, Complainant,
vs.

THE CITY OF OMAHA and WALDEMAR MICHAELSON, Defendants.

Memorandum Opinion.

W. H. MUNGER, D. J.:

In 1884, the City of Omaha was a city of the first class, governed by a legislative charter which gave to the corporate authorities of the city full power, control and authority over the streets and alleys of the city. In December, 1884, the city council of said city passed an ordinance, which was duly approved by the Acting Mayor of the city, which ordinance gave to the New Omaha-Thomson-Houston Electric Light Company or assigns, the right to erect and maintain poles and wires, with all the appurtenances thereto, upon and over the streets, alleys and public grounds of said city, "for the purpose

of transacting a general electric light business," under such reasonable rules and regulations as might be provided by ordinance. The provisions of the ordinance were accepted by the New Omaha-Thomson-Houston Electric Light Company, and an electric light plant established in the City of Omaha, the electrical current therefor being transmitted over wires strung upon poles erected upon the various streets and alleys within the city.

The application of electric power to stationary machinery was not much understood or developed in 1884, and for several years thereafter. As appliances were invented for such purposes they were used by said Electric Light Company.

Ordinances have subsequently been passed by the city of a general nature, requiring that all companies using or desiring to use electricity for light, power and heating purposes should be governed by certain regulations under the direction of the City Electrician. A subsequent ordinance was passed, requiring all companies furnishing electricity for lighting, heating and power purposes, to pay a certain percentage of gross receipts to the city. In 1903, shortly before the termination of the corporate existence of said New Omaha-Thomson-Houston Electric Light Company, it assigned all its property, and rights acquired by virtue of said ordinance of 1884, to complainant, and for the years 1902, 1903, 1904, 1905 and 1906, complainant paid to the City Treasurer of the City of Omaha the percentage upon its gross receipts for electrical energy furnished by it for lighting and power purposes, and complainant and its predecessors have invested a large sum of money in producing the electrical current for power and heat, in addition to what would have been required for lighting purposes only.

The city has also by ordinance required all companies transmitting electricity for heat, light and power purposes, to place within a certain prescribed district within the city all wires so used in conduits under the ground. In May, 1908, the city council by resolution approved by the mayor, directed the city electrician to disconnect, or cause to be disconnected, on or before July 1st, 1908, all wires leading from the conduits or poles of the Omaha Electric Light & Power Company, transmitting electricity to private persons or premises, to be used for heat or power, and to take such steps as would prevent said Omaha Electric Light & Power Company from furnishing or transmitting from the conduits or wires electricity to private persons or premises for heat or power purposes. The city electrician notified complainant of his purpose to carry out the provisions of said resolution. Thereupon complainant instituted this action to enjoin the city and said Michaelson, as city electrician, from enforcing the provisions of said resolution, or otherwise interfering with complainant in its business of furnishing under the provisions of the ordinance of 1884, electricity for light, heat and power purposes.

There are no controverted questions of fact, the case presenting simply questions of law.

I think the city had authority, in 1884, under the general power given it over the streets and alleys within the city, to pass the ordi-

nance in question, granting to the New Omaha-Thomson-Houston Electric Light Company, the privilege given by said ordinance.

The privilege given by said ordinance not being exclusive was not a special privilege or immunity within the meaning of Section 15 of Article 3 of the Constitution of the State.

City of Plattsmouth, vs. Nebraska Telephone Co., 80 Neb., 460; 114 N. W., 588.

Omaha Water Co., v. City of Omaha, 147 Fed., 1; 77 C. C. A., 267.

Nor was the grant to the New Omaha-Thomson-Houston Electric Light Company, or assigns, limited in duration to the corporate life of said company.

Detroit Citizens Street Ry. Co., vs. City of Detroit, 64 Fed., 628; 12 C. C. A., 363; 184 U. S., 368.

The ordinance of 1884 was limited in its terms to a "general electric light business,—and did not grant to the company authority for the transmission of an electrical current for purposes other than lighting.

Chicago General Street Ry. Co. vs. Ellicott, 88 Fed., 941.

City of Toledo vs. Western Union Tel. Co., 107 U. S., 10.

See, also, Sec. 907, Vol. 3, Abbott on Municipal Corporations.

It is, however, urged on the part of the complainant that the ordinance in question was a contract; that the parties by their acts and conduct have construed the ordinance as giving such authority, and the construction so given by the parties should be adopted by the Court. The rule, however, I think, is well settled that the interpretation given contracts by parties as shown by their acts can only be considered when the contract is ambiguous and susceptible of different meanings.

Russell vs. Young, 94 Fed., 45; 36 C. C. A., 71.

R. R. Co. v. Trimble, 10 Wall., 367-377.

Delaware Surety Co. v. Metropolitan Trust Co., 146 Fed. 600.

The ordinance in question is not, to my mind, ambiguous, but plain and specific, limiting the grant to general electric light purposes. In construing contracts and ordinances of this nature the general rule is that they should be construed strictly in favor of the public, yet they should receive a just and rational interpretation, and the Court endeavor to ascertain from the language used the true intent and meaning of the parties. To do this we should place ourselves back to the time of the passage of the ordinance in question, consider the then conditions, and ascertain what the city council at that time intended, and give the ordinance that construction, and not such a construction as private interests may now desire, nor such as public interest, after the lapse of years may desire.

The evidence shows, as before stated, that, at the time the city council acted in 1884, the application of electric power to stationary machinery was not much understood or developed, and was not for several years thereafter.

I cannot think that, in granting in 1884, the right to transmit electricity through the streets and alleys of the city for general electric lighting purposes, it was in the mind of the city council or any of the parties, or that they for a moment contemplated or intended, that the ordinance in question granted the right to transmit an electric current for all purposes and uses to which the inventive mind might in the future apply it, even though such new uses might be equally beneficial to the public. Had such been the intention the word "light" would have been omitted. The words "a general electric light business", as used in the ordinance, show clearly an intention to limit the use to which the electric current was to be applied.

No representations or conduct upon the part of the city are shown which would constitute an estoppel. Whether the ordinance granted authority to transmit electricity for other than lighting purposes was as well known to complainant and its predecessor as to the city, and the essential elements to constitute estoppel are not shown.

Crary vs. Dye, 208 U. S., 515.

Nor do I think the payment by complainant, and the receipt by the city, of a percentage upon complainant's gross income, derived from the sale of electricity for power as well as lighting purposes, constitutes a valid ratification of the assumed authority of complainant. The law, I think, fundamental, that a power required to be given by a city by ordinance can only be modified or enlarged by ordinance. The payments made by complainant were merely voluntary payments, made with full knowledge of all facts and its legal rights, and upon no representations or conduct by the city which estops it from denying that complainant's rights are greater than those expressly stated in the ordinance of 1884.

The conclusion above reached renders it unnecessary to determine whether or not the ordinance of 1884, containing no time limit, constituted a perpetual, irrevocable contract, or, as said in *Boise City Artesian Hot & Cold Water Co. vs. Boise City*, 123 Fed., 232; 59 C. C. A., 236, was a mere privilege, revocable at will.

The case will be dismissed for want of equity.

That complainant may have ample time to protect its rights by an appeal, if it should so desire, the restraining order heretofore granted will remain in force, and the decree will not be formally entered until the 31st day of the present month.

Endorsed: Filed Jul. 17, 1909. Geo. H. Thummel, Clerk.

* * * * *

(Record, Page 125.)

No. 105, Docket "Y".

OMAHA ELECTRIC LIGHT & POWER Co.

vs.

THE CITY OF OMAHA and WALDEMAR MICHAELSON.

This cause came on to be heard at the September 1908 term and was submitted by the parties on the merits and argued by counsel.

and taken under advisement by the court; and now, on this 22d day of July, A. D. 1909, upon consideration thereof, it is

Ordered, Adjudged and Decreed as follows, viz: that the complainant's bill of complaint be, and the same is, hereby dismissed for want of equity, and that the said complainant pay the costs therein, taxed at \$—, and that execution issue therefor.

W. H. MUNGER, *Judge*.

Endorsed: Filed Jul- 22, 1909. Geo. H. Thummel, Clerk.

* * * * *

(Record, page 135.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1909.

No. 3141.

OMAHA ELECTRIC LIGHT AND POWER COMPANY, Appellant,
vs.

CITY OF OMAHA et al., Appellees.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Mr. Westel W. Morsman for appellant.

Mr. Harry E. Burnam and Mr. I. J. Dunn for appellees.

Before Sanborn and Adams, Circuit Judges.

ADAMS, Circuit Judge, delivered the opinion of the court.

The Electric Light Company had been carrying on the business which its name indicates in the City of Omaha for some twenty-five years, when in May, 1908, by a concurrent resolution of the City Council the electrician of the City was directed to disconnect the wires of the Company so as to prevent their use for the transmission of electric current for heat or power. To enjoin that threatened action was the purpose of this suit, which was instituted by the Company against the City and its electrician, Michaelson. The Circuit Court refused to issue the injunctive order and on final hearing dismissed the bill. The Company appeals.

On December 16, 1884, the City passed an ordinance known as No. 826, as follows: "Be it ordained by the City Council of the City of Omaha: SECTION 1. That the New Omaha Thomson-Houston Electric Light Company, or assigns, is hereby granted the right of way for erection and maintenance of poles and wires, with all the appurtenances thereto, for the purpose of transacting a general electric light business through, upon and over the streets, alleys and public grounds of the City of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance." . . . "Provided

Further, that whenever the City Council shall, by ordinance, declare the necessity of removing from the public streets and alleys of the City of Omaha the telegraph, telephone or electric poles or wires thereon constructed or existing, said Company shall, within sixty (60) days from the passage of such ordinance remove all poles and wires from such streets and alleys by it constructed, used or operated."

At the time this ordinance was passed the Electric Light Company referred to therein had not been incorporated.

It was, however, understood that it should be and it subsequently was incorporated pursuant to that understanding for a term of twenty years to expire September 26, 1895. The Company being then an incorporated body of limited life tenure, accepted the ordinance as passed and thereby entered into contract relations with the City. These facts estop both parties from denying that there was a corporation in existence at the time the contract was formally concluded or that such corporation was one of limited life tenure. The Company afterwards proceeded to construct a plant and machinery for generating electric current with a system of poles and wires in the streets and alleys for its transmission and distribution throughout the City and maintained the same continuously until July 29, 1903, when its corporate life being about to expire by limitation it sold and transferred its property and franchises to the complainant Omaha Electric Light & Power Company. The latter named Company continued the business of its predecessor without interruption until May, 1908, when the following concurrent resolution was adopted: "Resolved, by the City Council of the City of Omaha, the Mayor concurring, that the City Electrician be, and he is hereby ordered and directed to disconnect, or cause to be disconnected, on or before July 1st, 1908, all wires leading from the conduits or poles of the Omaha Electric Light and Power Company transmitting electricity to private persons or premises to be used for heat or power; and to take such steps as may be necessary to prevent the said Omaha Electric Light & Power Company from furnishing or transmitting from the conduits or wires, electricity to private persons or premises for heat or power purposes."

The City was about to carry this resolution into effect when the bill in the case was filed. On the hearing of an application for a temporary restraining order the cause was by agreement submitted on the merits for a final decree.

The complainant claimed that because its grant from the City was absolute in form, containing no limitation upon its duration, it constituted a grant in perpetuity entitling it and its successors or assigns to use the streets forever for the distribution of its electric current. The City claimed (1) that it was without power to grant a perpetual franchise and (2) that if it had the power it did not exercise it but at best conferred upon the Company a license to occupy its streets revocable at the will of the City at least after the expiration of the corporate life of the Company.

The joint resolution of May, 1908, disclosed the intention on the part of the City to prevent the Company from using its streets for transmitting electricity for *heat or power* purposes only. The claim

was that the ordinance in terms granted the right of way for the purpose of transacting "a general *electric light business*" only and that furnishing either heat or power was not comprehended within the terms of the grant.

The court below adopted the theory that the ordinance in granting the right to transact "a general electric light business" necessarily limited the right of the Company thereunder to use the streets to carry on a lighting business only and did not confer upon it the right to use them for any other branch of business.

It was argued in opposition, among other things, that the words "general electric light business" are of such uncertain and ambiguous import as to permit elucidation by the practical construction placed upon them by the parties and that as so constructed they comprehended the business of transmitting electric current for heat and power as well as light.

Many facts called to our attention by learned counsel for complainant indicate that the City allowed the Company to invest large sums of money in preparing for this extended service; knew it was about to enter upon it and that it was continuing in it and not only did not object but received pecuniary emoluments therefor.

Such being the case, the argument at the bar was extended beyond the limited inquiry made by the trial court. It was addressed to the fundamental questions, whether the City had the power to grant a perpetual franchise, and if so whether it had in fact done so. As these questions necessarily include the less important one actually decided below, we will confine ourselves to them.

Undoubtedly the ordinance granted to the Company either (1) a franchise to use the streets of the City perpetually, (2) a franchise to use them for a reasonable time, the same to be determined in view of all the facts and circumstances, or (3) a license revocable at the will of the City at any time. Which of these is correct?

The City contends it cannot be construed as a perpetual franchise because that would violate the prohibition of Art. I. Sec. 16 of the Constitution of Nebraska which ordains that "no" . . . "law" . . . "making any irrevocable grant of special privileges or immunities" . . . "shall be passed".

The Company contends that the grant of a perpetual franchise which confers no exclusive right to the grantee is not the grant of a special privilege or immunity within the meaning of the Constitution and relies upon *Plattsburgh v. Nebraska Telephone Co.*, 80 Neb., 460, 464; *Omaha Water Co. v. City of Omaha*, 77 C. C. A. 267, 272, 147 Fed. 1, and cases there cited.

This contention of the Company might be conceded and the question would not be settled.

The legislature of the State which primarily had the authority to grant the use of streets for other than the ordinary purposes of travel, could have exercised its authority by direct legislation or through the instrumentality of the City in which the streets were situated.

In *Wright v. Nagle*, 101 U. S. 791, the question related to the grant of a franchise to maintain a toll-bridge. The Supreme Court

there said: "A grant of this franchise from the public in some form is therefore necessary to enable an individual to establish and maintain a toll-bridge for public travel. The legislature of the State alone has authority to make such a grant. It may exercise this authority by direct legislation, or through agencies duly established, having power for that purpose. The grant when made binds the public, and is, directly or indirectly, the act of the State. The easement is a legislative grant, whether made directly by the legislature itself, or by any one of its properly constituted instrumentalities." See to the same effect *City Railway Co. vs. Citizens' Railroad Co.*, 166 U. S. 557, 563.

The mayor and council, therefore, in making the contract evidenced by ordinance 826 were exercising a delegated authority. The State by act of its legislature approved February 21, 1883, (laws of 1883, p. 90.) empowered the mayor and council of each city to pass any and all ordinances not repugnant to the Constitution and laws of the State; . . . "to provide for the lighting of the streets" . . . "to care for and control" . . . "streets, avenues, parks and squares within the City" and by act of its legislature approved March 3, 1885, before acceptance by the Company of the grant in question (laws of 1885, Chap. 13, p. 117), it again empowered them "to provide for the lighting of streets, laying down of gas pipes and erection of lamp-posts, and to regulate the sale and use of gas and electric lights, the charge for electric light and the rent of gas meters within the City, and to require the removal from the streets, avenues, and alleys, and the placing on the ground of all telegraph, electric and telephone wires."

Legislative grants of power to municipal corporations must be strictly construed, and cannot operate as a surrender of legislative power except so far as expressly delegated or is indispensably necessary to the exercise of some other power which has been expressly delegated. *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 59 C. C. A. 236, 123 Fed. 232; *City of Detroit v. Detroit City Ry. Co.*, 56 Fed. 867, 876; *Turnpike Co. v. Illinois*, 96 U. S., 63; *Long Island Water Supply Co., v. Brooklyn*, 166 U. S., 685, 696; *Citizens' St. Railway v. Detroit Railway*, 171 U. S. 48; *Water, Light & Gas Co. v. City of Hutchinson*, 207 U. S., 385; *Lancaster County v. Green*, 54 Neb. 98.

Applying this rule to the present case we are of opinion that the conference of power in general terms to "provide for lighting the streets" or "to care for and control the streets" is not specific enough to warrant a grant by the city to a business corporation of the right to use the streets of the city forever for the purpose of conducting a general lighting business. That is a servitude not embraced within the ordinary control over streets usually given to municipalities.

A perpetual franchise even if not exclusive in fact becomes largely so by the advantage in the race which pro-occupancy of the field and perpetual right to continue in it afford. And while it may not be technically obnoxious to the Constitutional prohibition against "granting special privileges or immunities" it is so unusual and extraordinary as to require, in our opinion, a more specific legislative

authorization than the general language relied on by the Company therefor.

We therefore conclude that even if the mayor and council had intended to grant a perpetual franchise to the Company they were powerless to do so.

This conclusion might put an end to further discussion but another proposition was argued before us which brings us to the same result. The ordinance when taken as a whole and construed in the light of what was expressed as well as unexpressed in it and in view of all the attending facts and circumstances, discloses, we think, a clear purpose not to grant a perpetual franchise.

The right to use the streets of the City forever to inaugurate and promote a private enterprise would seem to have been so important and valuable a feature of the contract as to irresistably lead the contracting parties to mention it specifically if they intended to provide for it and not leave its existence dependent upon implication.

The ordinance actually reserved to the City the right to require the removal of the poles and wires from the streets within sixty days after the City Council should declare the necessity therefor by ordinance. This is not only inconsistent with but it seems quite repugnant to the claim of perpetuity now made by the Company.

On the other hand the cost and expense of installing and maintaining an electric lighting system was so great as to render it unlikely that the Company would embark upon it without assurance of some reasonable term of enjoyment.

Moreover, the fact that the Company was permitted without let or hindrance to continue its business for the full period of twenty years indicates a mutual understanding that some substantial term of enjoyment was contemplated. That was a practical construction placed upon a contract of dubious meaning which, according to well recognized law, should receive due consideration at the hands of the Court.

In view of the foregoing, disclosing that no perpetual franchise was intended and pointing to the improbability of the Company embarking upon the business without some assurance of extended enjoyment, we think the fact that the corporate life of the Company continued for a period of twenty years affords a key to the true intention of the parties.

It is improbable that the mayor and city council with due regard to the rights of the inhabitants of the city would tie their own hands as well as that of all future councils and mayors by granting a perpetual franchise to a Company whose corporate life rendered it certain that it could not discharge its duties more than twenty years and with no obligation upon it at the end of its life to assign its rights to another person or corporation empowered or obligated to accept the grant and perform the desired service.

In *Turnpike Co. v. Illinois* (supra) the Supreme Court of the United States in considering whether the grant of a given franchise was in perpetuity or not made use of the following language: "No term was expressed for the enjoyment of this privilege; and no conditions were imposed for resuming or revoking it on the part of

the State. It cannot be presumed that it was intended to be a perpetual grant, for the Company itself had but a limited period of existence. At common law, a grant to a natural person, without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. But by analogy to this, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation." . . . "Grant of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public."

In *Wyandotte Electric Light Co. v. City of Wyandotte*, 124 Mich. 43, the Supreme Court of Michigan considered an application to restrain interference with poles and wires of an electric light company and said: "If a railroad company were organized for a period of thirty years, and a party, natural or corporate, should grant it a right of way without specifying the time of user, the grant would be for the lifetime of the corporation. The law would imply that both parties contracted with reference to its period of existence. The same rule is applicable here." Citing *Turnpike Co. v. Illinois* (supra). To the same effect are *Blair v. Chicago*, 201 U. S., 400, 481; *City of Rock Island v. Central U. Tel Co.*, 132 Ill. App., 248; *Virginia Canon Toll Road Co. v. The People*, 22 Colo., 429.

We think the facts of this case, in the light of the foregoing authorities, disclose the intention that the Company should have and enjoy the franchise in question at least for the period of its corporate existence and that its assigns or successors might thereafter hold and enjoy the same at the will of the City only.

This conclusion reconciles many if not all of the apparent inconsistencies of the situation and is not in disharmony with the principle declared in *Detroit v. Detroit Citizens' St. Ry Co.*, 184, U. S. 368, 395, and *State ex rel. City of St. Louis v. Laclede Gaslight Co.*, 102 Mo. 472, that a corporation whose corporate existence was limited to a term of years could accept a grant or make a contract extending beyond the limit of its corporate life.

The question here is not whether a lawful contract could be made for a term extending beyond the corporate life of the Company but relates to the probative force which limited life tenure among other facts and circumstances has in construing a contract of uncertain and ambiguous character like that under consideration.

It follows that the Electric Light and Power Company at the time of the threatened removal of its equipment by the city was occupying the streets as a licensee at the will of the city.

Without passing on the question whether the grant of a franchise to use streets for "an electric light business" is sufficiently comprehensive to include the right to use them for the purpose of transmitting electric current for heat and power purposes, we think the decree dismissing the bill was correct on the ground that the franchise to use the streets for any purpose had expired before this suit was brought. The decree below is accordingly

Affirmed.

Filed April 20, 1910.

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(Record, page 142.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

No. 3141.

OMAHA ELECTRIC LIGHT & POWER COMPANY, Appellant,
vs.
CITY OF OMAHA and WALDEMAR MICHAELSON.

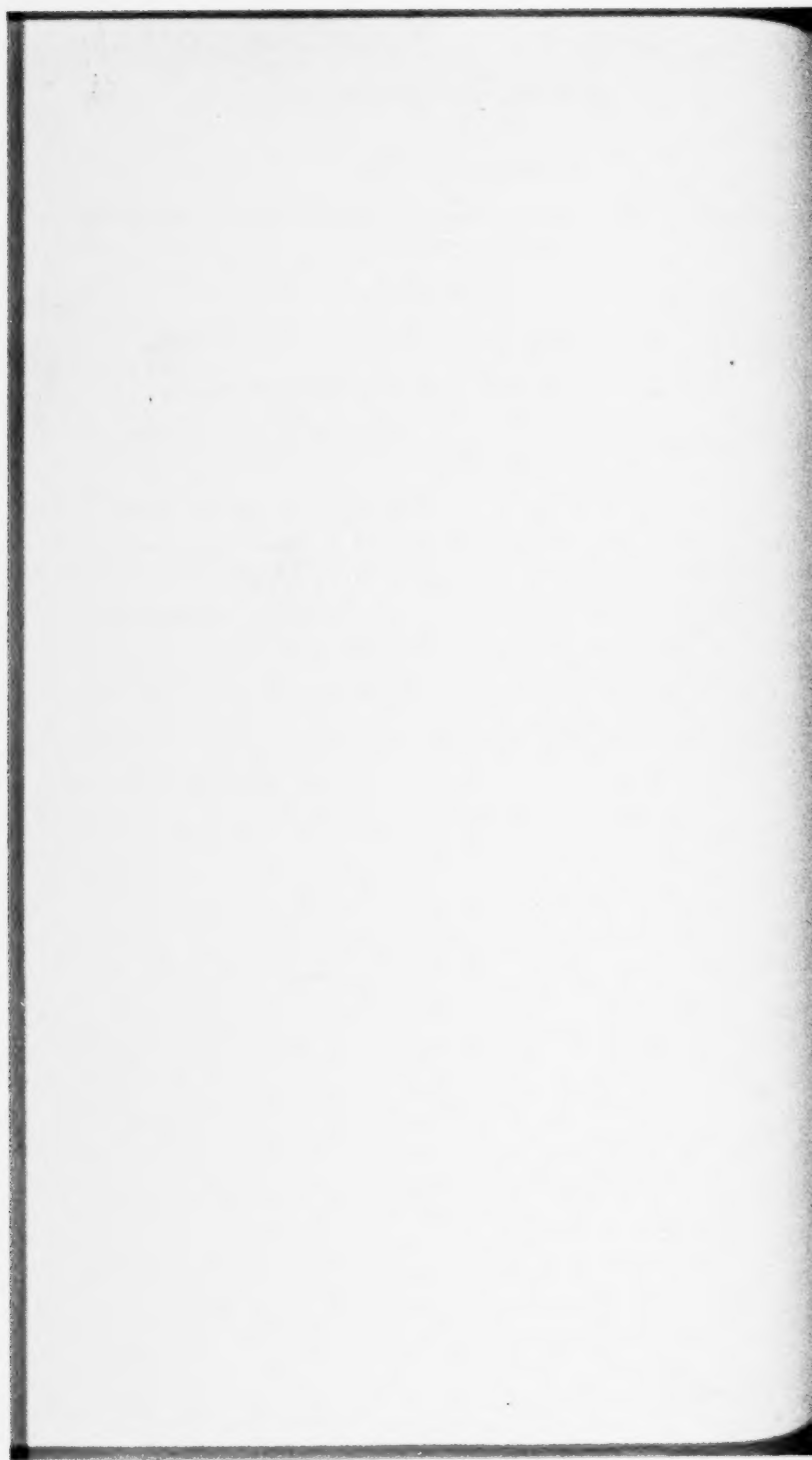
Appeal from the Circuit Court of the United States for the District of Nebraska.

WEDNESDAY, April 20, 1910.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nebraska; and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that the City of Omaha and Waldemar Michaelson have and recover against the Omaha Electric Light and Power Company the sum of twenty dollars for their costs herein and have execution therefor.

April 20, 1910.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

Ex Parte THE OMAHA ELECTRIC LIGHT & POWER COMPANY, *Petitioner*,

PETITION FOR WRIT OF CERTIORARI, REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASE OF OMAHA ELECTRIC LIGHT & POWER COMPANY, *Appellant*, *versus* THE CITY OF OMAHA AND WALDEMAR MICHAELSON, *Appellees*.

To the Honorable the Supreme Court of the United States:

The petition of Omaha Electric Light & Power Company respectfully shows to this honorable court, as follows:

1. Your petitioner is a corporation and for many years now last past has been engaged in the business of gener-

ating, distributing and selling electric current or energy in and throughout the city of Omaha, in the State of Nebraska, and adjoining communities, said energy being now used and for many years last past having been used by the consumers thereof in the production of light, power and heat. That your petitioner is so engaged in generating and distributing electric current or energy under and by virtue of a franchise granted by an ordinance known as Ordinance No. 826, passed by the city council of the City of Omaha and approved by the Mayor of said city on the 16th day of December, 1884, a true and correct copy of which said ordinance is set forth in the record hereinafter referred to and on file in this court.

2. That for more than twenty-five years your petitioner and its grantor have been continuously engaged in carrying on said business in said city of Omaha and adjoining communities with the consent, encouragement and active participation of the city of Omaha in the conduct of said business.

3. That throughout the said period the business of your said petitioner and its grantor constantly increased from year to year, both in the distribution of electric energy which was used in the production of light and in the distribution of electric energy which was used for power and heat, and that during said period the manufacturing establishments of the city of Omaha and adjoining communities, have been adjusted, both as to buildings and appliances, to the use of electric energy as motive power, and the said manufacturing establishments have been and are dependent upon your petitioner for electric energy for use as motive power in the carrying on of the said manufacturing establishments.

4. That there is no other company or individual in Omaha in a position to supply to the said manufacturers

and said communities electric energy adequate to the furnishing of the motive power required for said manufacturing establishments.

5. That the city of Omaha and your petitioner, from the time of the acceptance of the grant under Ordinance No. 826, have constantly and consistently interpreted said grant as conferring upon your petitioner authority to furnish electric current not only for the development of light but for the development of heat and power and have also construed said grant as conferring said rights without limit as to time, and the said city, by its conduct from the time of the granting of said ordinance to the present time, has estopped itself from contending that said grant did not authorize your petitioner to furnish electric current for heat and power as well as for light, and has also estopped itself from contending that the grant under said Ordinance No. 826 was limited in duration, all of which appears from the facts in this case as set forth in the said record.

6. That the city of Omaha, on the 26th day of May, 1908, in the exercise of its delegated legislative authority, passed a concurrent resolution directing the city electrician of the city of Omaha to cut the wires of your petitioner within said city of Omaha which were and are used to carry electric current to supply power and heat to consumers, a true and correct copy of which said resolution is set forth in the said record.

7. That on the 29th day of June, 1908, your petitioner filed in the United States Circuit Court for the District of Nebraska its bill against said city of Omaha and said Waldemar Michaelson, said electrician of said city of Omaha, praying that perpetual injunction issue restraining said city and said city electrician from carrying out said resolution; that thereafter such proceedings were had in said cause that a decree was entered therein dismissing the said bill for

want of equity upon the ground that under the said franchise ordinance your petitioner had no authority to use the streets of the city of Omaha to distribute electric energy to be utilized for power or heat purposes; all of which, together with the opinion of the court, being set forth in the said record.

8. Your petitioner perfected an appeal from the said decree of the said Circuit Court of the United States to the Circuit Court of Appeals of the United States for the Eighth Circuit and thereafter such proceedings were therein had in said court that a decree was entered in said cause dismissing the said appeal for want of equity for the reason and upon the ground that the franchise rights granted to and possessed by your petitioner under the said franchise ordinance had expired prior to the passage of said resolution, all of which will fully appear from the said record.

9. Thereafter your petitioner perfected an appeal from the said decree of the said Circuit Court of Appeals in said cause to this court, the said appeal having been lodged in this court on the 3d day of November, 1910. A complete and duly certified transcript of the record in said cause was filed in this court with said appeal, and has been printed.

Your petitioner prays that such transcript or a printed copy thereof may be considered as annexed to and made a part of this petition.

10. Thereafter, on the day of, 190., the said city of Omaha and Waldemar Michaelson, appellees in said appeal, filed in this court a motion to dismiss the said appeal, claiming that this court was without jurisdiction to hear and determine the said appeal. Thereafter the said motion was submitted to this court upon briefs duly filed by the respective parties to said appeal, and subsequently this court entered an order direct-

ing that the said motion be heard at the time the said cause was reached on the docket of the said court for argument upon the merits thereof. The record as above set forth filed in this court with said appeal contains the full record of the proceedings in said cause and is the record hereinabove referred to and constitutes the full and complete record in said cause in said United States Circuit Court of Appeals for the Eighth Circuit.

11. That on the second day of October, 1911, the Old Colony Trust Company, trustee in a mortgage executed by your petitioner, in and by which instrument of mortgage all the rights of your petitioner under said franchise ordinance were conveyed to said Old Colony Trust Company as trustee, together with other property, as security for the bonds issued under said mortgage, filed in the Circuit Court of the United States for the District of Nebraska its bill in equity against the city of Omaha averring its interest as mortgagee in the said property and franchise rights and the necessity of the protection and enforcement thereof for the protection of the holders of the bonds issued under said mortgage and secured thereby, and praying that the said city of Omaha and its officials be restrained and enjoined from enforcing the resolution hereinabove mentioned. Thereafter such proceedings were had in said cause that a decree was entered in said District Court of the United States for the District of Nebraska dismissing said bill for want of equity, on the authority of the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case first hereinabove mentioned. Thereafter an appeal was perfected by the said Old Colony Trust Company from the said decree to this court, and the said appeal and a certified copy of the record in said last-mentioned cause was filed in this court, said cause being entered upon the docket of this court as case No. 754.

12. That thereafter a motion was filed in this court asking that the said last-mentioned cause be advanced for hearing and heard together with the said appeal by your petitioner as hereinabove mentioned, being case No. 162 upon the docket of this court. Thereafter this court by order sustained said motion and ordered the said two cases hereinabove mentioned to be heard together. Thereafter the said causes came duly on to be heard before this court and were argued and submitted to this court on the 28th day of February, 1913.

13. That thereafter this court ordered said causes to be reinstated upon the docket of this court for reargument and assigned the said causes for hearing on the 7th day of April, 1913, subject to cases previously assigned for that day.

14. Your petitioner, without waiving its said appeal in said cause, and still insisting and believing that said appeal is well taken and that the motion to dismiss heretofore referred to should be and will be overruled, nevertheless presents this its petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, directing said court to send to this court the record in said first mentioned cause, for the following reasons:

(a) There is manifest error on the face of the record, that is to say:

(1) The Circuit Court of Appeals erred in holding and deciding that "even if the Mayor and Council had intended to grant a perpetual franchise to the company, they were powerless to do so."

(2) The Circuit Court of Appeals erred in deciding and holding that the ordinance-contract granting to New Omaha Thomson-Houston Electric Light Company, and its assigns, the franchise to occupy the streets and public ways,

must be limited to the term of twenty (20) years (the term for which the grantee was incorporated under a general law of the State, after the passage of the granting ordinance) and that, "its assigns or successors might thereafter hold and enjoy the same at the will of the city only."

(3) The Circuit Court of Appeals erred in rendering a decree affirming the decree of the Circuit Court.

(b) That the principal questions involved in the case, to wit, (1) whether the right of the company to maintain its system of poles, wires and conduits in the streets of the city of Omaha for any purpose has expired; (2) whether the franchise ordinance carries the right to supply electric current for heat and power as well as for light; (3) whether under the facts of the case as shown by the record the parties have not construed the contract as granting your petitioner authority to transact the business of furnishing current not only for light but also for heat and power, and whether the city has not estopped itself from contending otherwise; and, (4) whether under the facts of the case as they appear in the record the parties have not so construed the contract as to prevent and now estop the city from contending that the right granted to the company under the said Ordinance No. 826 has expired, are all of gravity and general importance in that they affect not only the private interests of the company but the interests of the public as well, including numerous and important manufacturing and industrial plants and establishments in the city of Omaha and surrounding communities which are dependent for their maintenance and operation upon your petitioner for their supply of light, heat and power.

(c) That the decision by the Circuit Court of Appeals is in conflict with the decision of the Supreme Court of the State of Nebraska respecting the power and authority of

the city of Omaha to grant to public service corporations franchise rights similar to those claimed by your petitioner under said franchise Ordinance No. 826, as appears from the briefs of your petitioner on file in this court, and also from the brief of the appellant in said cause No. 754.

(d) That in the above-mentioned case of Old Colony Trust Company, Trustee, appellant, against the city of Omaha, No. 754, there are involved precisely the same issues as those involved in said cause of your petitioner against the city of Omaha, and that unless the last-named cause shall be brought by certiorari to this court and the said decision therein of the Circuit Court of Appeals reviewed and corrected it is possible that a conflict will arise between said decision and the decision reached by this court in said cause of Old Colony Trust Company, Trustee, appellant, versus city of Omaha, affecting not only the rights of the company and its bondholders but those of the public at large as well.

(e) That it is of the utmost importance that the decisions of the said questions in the cause herein set forth of your petitioner, appellant, versus city of Omaha, and the said cause of Old Colony Trust Company versus city of Omaha be in harmony.

(f) That in a case heretofore instituted in the District Court of Douglas County, Nebraska, and from a decision therein rendered appealed to the Supreme Court of the State of Nebraska a decision was rendered by said last-named court in the case entitled Omaha & Council Bluffs Street Railway Company vs. the city of Omaha on facts substantially identical though less persuasive than the facts appearing in the record in this cause, wherein the supreme court of that State held and adjudged that under such facts the city of Omaha was estopped from claiming or asserting that the said city was entitled to enforce the pro-

visions of the said concurrent resolution hereinbefore referred to, the opinion of the said court in said cause being set forth in the briefs on file in said causes, and your petitioner urges that it is of vital importance that there should be no conflict between the decisions of the Supreme Court of the State of Nebraska and the decisions of the Federal courts on the questions so involved.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals in the said case therein entitled Omaha Electric Light & Power Company, Appellant, vs. City of Omaha and Waldemar Michaelson, Appellees, to the end that the said cause may be reviewed and decided by this court, or that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the acts of Congress in that respect provided, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your petitioner prays in the alternative that this court may order the said writ of certiorari to issue and consider said record, already on file in your petitioner's said appeal, as a return to the said writ and thereupon proceed to determine and decide the said cause upon its merits.

And your petitioner will ever pray, etc.,

OMAHA ELECTRIC LIGHT & POWER COMPANY,

By

Edgar H. Scott
Attorney and Counsel for Petitioner.

DISTRICT OF COLUMBIA, }
City of Washington, } ss.:

EDGAR H. SCOTT, being first duly sworn, on oath, says he is one of the attorneys and of counsel for Omaha Electric Light & Power Company, the petitioner above named, and as such is in personal charge for said petitioner of the case in the foregoing petition mentioned, that he has read the said petition by him subscribed and that the facts therein stated are true to the best of his information and belief.

.....

Sworn to and subscribed before me this
 day of April, 1913.

.....

Notary Public.

My commission expires, 191...

AUTHORITIES IN SUPPORT OF THE FOREGOING PETITION
FOR CERTIORARI.

Security Trust Co. v. Dent, 187 U. S., 237.

Montana Mining Co. v. St. Louis Co., 204 U. S.,
204.

White-Smith Co. v. Apollo Co., 209 U. S., 1.

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Opinion of the Court.

OMAHA ELECTRIC LIGHT AND POWER CO. v.
CITY OF OMAHA.APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

No. 162. Motion to dismiss or affirm submitted October 23, 1911, and postponed to the hearing on the merits. Argued February 27, 28, 1913. Reargued April 10, 11, 1913.—Decided June 16, 1913.

As a basis of jurisdiction of the Circuit Court it is not enough that recovery might be sought upon a constitutional ground; it must clearly appear that it is actually so sought.

Where diverse citizenship exists and the complainant plants its right to relief on the doctrine of estoppel, the case is not one arising under the Constitution of the United States, even though recovery might have been sought on the ground of impairment of the contract, and the judgment of the Circuit Court of Appeals is final.

Appeal from 179 Fed. Rep. 455, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from the Circuit Court of Appeals under the Judiciary Act of 1891, are stated in the opinion.

Mr. Frank Crawford, Mr. John A. Rine, Mr. William C. Lambert, Mr. Benjamin S. Baker, Mr. I. J. Dunn and Mr. L. J. TePoel, for appellees, in support of motion to dismiss or affirm.

Mr. Lodowick F. Crofoot and Mr. Edgar H. Scott for appellant, in opposition thereto.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The facts out of which this suit arose are fully set forth in *Old Colony Trust Co. v. Omaha*, ante, p. 100, and need

not be repeated here. The Electric Company brought the suit in the Circuit Court, against the city and its electrician, to enjoin the threatened disconnection, pursuant to the resolution of 1908, of the company's wires used in supplying its patrons with electric current for power and heating purposes. There was a decree for the defendants, 172 Fed. Rep. 494, which was affirmed by the Circuit Court of Appeals, 179 Fed. Rep. 455, and a further appeal brought the case here.

Our jurisdiction is challenged, by a motion to dismiss, on the ground that the decision of the Circuit Court of Appeals is final. The motion is well taken if the jurisdiction of the Circuit Court was invoked solely on the ground of diverse citizenship. Act of March 3, 1891, 26 Stat. 826, c. 517, § 6; Judicial Code, § 128. That it was invoked on that ground is conceded, so it is necessary to inquire whether, as is asserted in opposition to the motion, it was also invoked upon the ground that the suit was one arising under the Constitution of the United States. This must be determined from the plaintiff's statement of its own cause of action as set forth in the bill, regardless of questions that may have been subsequently brought into the suit. *Shulthis v. McDougal*, 225 U. S. 561, 569; *Denver v. New York Trust Co.*, 229 U. S. 123.

Briefly described, the bill set forth the adoption by the city council of the franchise ordinance of 1884, its acceptance by the Thompson Company, the construction and installation of the electric plant, the transfer of the plant and franchise to the Electric Company in 1903, the business done by the two companies in supplying current for power and heating, as well as for lighting, purposes, the enlargement and improvement of the plant from time to time to meet the increasing demand for current for those purposes, the city's acquiescence in and encouragement and sanction of all this with knowledge

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that it was done under a claim of right under the franchise ordinance, the exaction by the city of three per cent. of the gross earning, including those from current supplied for power and heat, the adoption of the resolution of 1908, and the threatened disconnection thereunder of all wires used for transmitting current for power and heating purposes. The bill further charged that in what was done prior to the resolution the city and the two companies had treated the franchise as including the right to use the streets in transmitting current for power and heat; that upon the faith of this practical construction the plaintiff had expended large sums of money in developing and equipping its plant according to approved modern standards; and that the interference with its wires and business which was threatened by reason of the changed attitude of the city would result in great and irreparable loss and damage to the plaintiff.

The relief sought was a perpetual injunction restraining the defendants from disconnecting the plaintiff's wires or interfering with or impeding its business as theretofore conducted. There was no prayer that the resolution be pronounced void, nor any allegation that it impaired the franchise contract or would operate to deprive the plaintiff of its property without due process of law, nor any reference to the Constitution of the United States, or any of its provisions, nor even a general statement that a constitutional right was being or about to be infringed.

Tested by the recognized standard, we think the bill did not state a case arising under the Constitution. It did not show, either in terms or by necessary intendment, that the plaintiff was asserting a right, privilege or immunity under the Constitution or was in anywise invoking its protection. For anything that appeared the plaintiff was planting its right to relief entirely upon the doctrine of estoppel. As a basis of jurisdiction, it is not enough that recovery might be sought upon a constitutional

Syllabus.

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ground, for it must clearly appear that it is actually so sought. *Crowell v. Randell*, 10 Pet. 368, 392; *Hanford v. Davies*, 163 U. S. 273, 280.

It being thus apparent that diverse citizenship was the sole ground upon which the jurisdiction of the Circuit Court was invoked, it follows that the decision of the Circuit Court of Appeals was final. *Spencer v. Duplan Silk Co.*, 191 U. S. 526; *Bankers Casualty Co. v. Minneapolis &c. Railway Co.*, 192 U. S. 371; *Shulthis v. McDougal*, *supra*; *Lovell v. Newman*, 227 U. S. 412; *Denver v. New York Trust Co.*, *supra*.

Appeal dismissed.

MR. JUSTICE HOLMES took no part in the consideration and decision of this case.
